

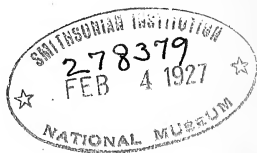


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the University



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INDIANA UNIVERSITY STUDIES



Study No. 69

INTRODUCTION TO ANGLO-AMERICAN LAW. COVER-
ING BRIEFLY LEGAL PHILOSOPHY, LEGAL HISTORY, LEGAL
BIOGRAPHY, LEGAL BIBLIOGRAPHY. By HUGH EVANDER
WILLIS, A.M., LL.M., LL.D., Professor of Law in In-
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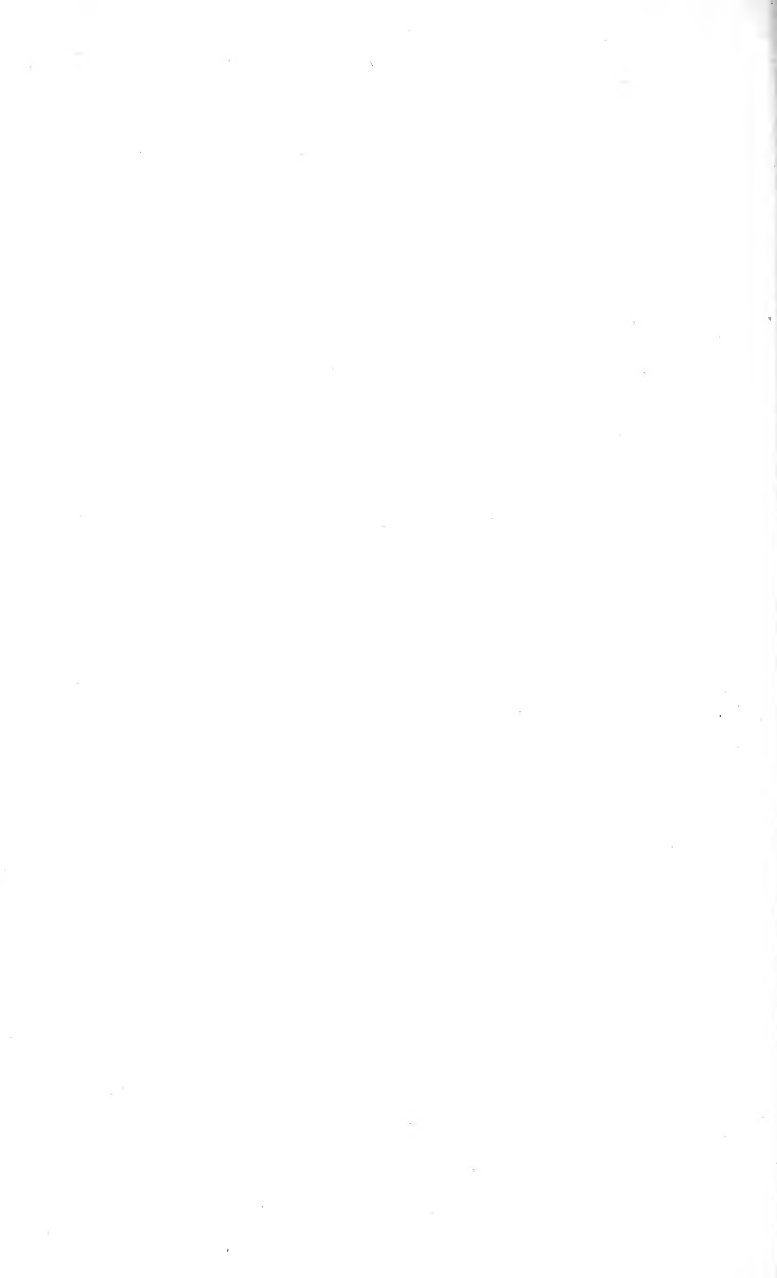
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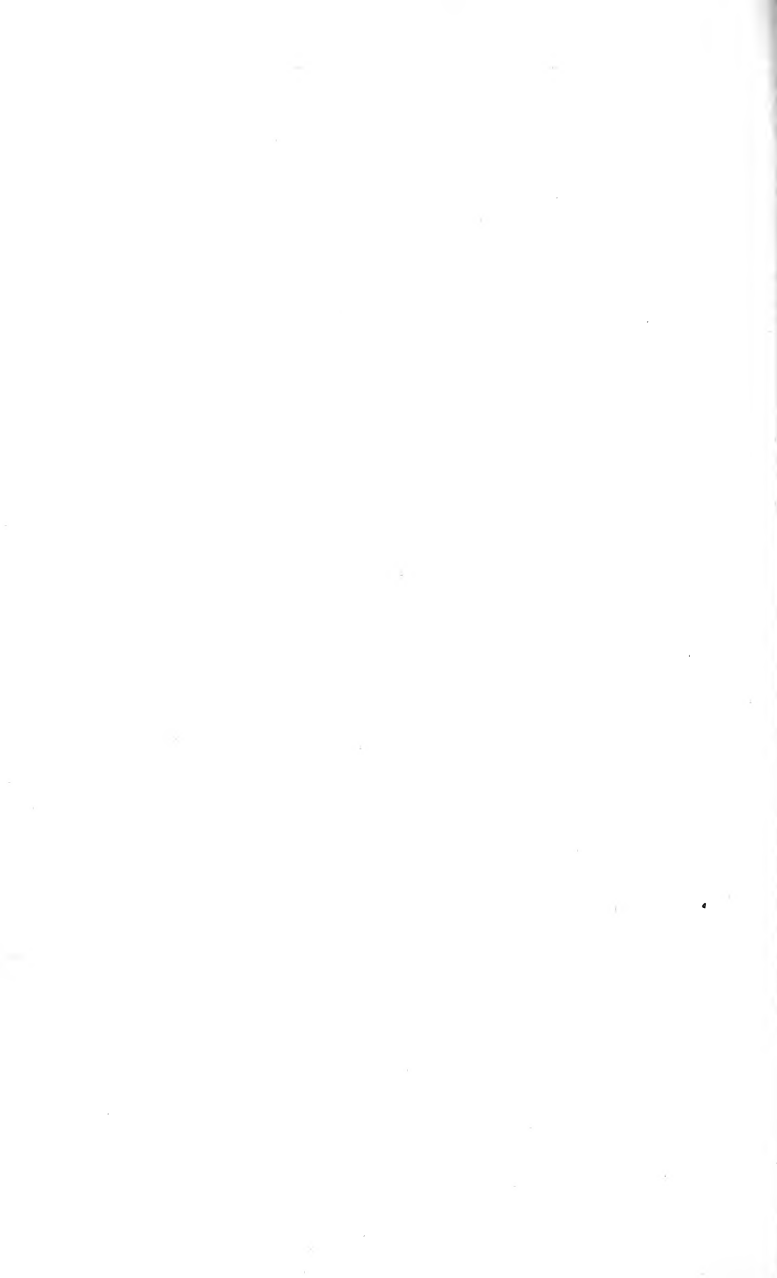
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PART ONE

SOME FUNDAMENTAL LEGAL CONCEPTS



Introduction to Anglo-American Law

By

HUGH EVANDER WILLIS¹

CHAPTER I

LAW

Law Defined. There is no more important and fundamental legal concept than that of "law" itself. For this reason, before discussing any of the more specific legal concepts, we shall first discuss this general legal concept. What is the meaning of "law"? How should the term "law" be defined?

There have been a great many definitions of "law". Probably the best known definition is that of Blackstone. Blackstone's definition once had great vogue, but it is now generally repudiated. Blackstone said that law, in its most general and comprehensive sense, "is that rule of action which is prescribed by some superior and which the inferior is bound to obey".³ Civil law he defined as "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong".⁴ Blackstone's definition includes two notions: (1) that of a "superior", and (2) that of a "command". Both of these notions are incorrect. Law is not something prescribed by a superior to an inferior. If it were, not only would it not include international law,⁵

¹ Professor of law in Indiana University.

² Pound, "Interests of Personality", 28 *Harv. L. Rev.* 343, 445; 3 *Dunster House Papers*, 3-4; *History and System of the Common Law*; *The Spirit of the Common Law*; *Introduction to Philosophy of Law*; *Interpretations of Legal History*; 1 *Lib. Am. Law and Prac.* 1, 8; Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 *Yale L. Jour.* 16, 26 *Yale L. Jour.* 710; also 11 *Mich. L. Rev.* 537; Corbin, "Legal Analysis and Terminology", 29 *Yale L. Jour.* 163; Kocourek, 15 *Ill. L. Rev.* 24, 347; 20 *Col. L. Rev.* 394; 68 *Pa. L. Rev.* 322; 19 *Mich. L. Rev.* 47; 30 *Yale L. Jour.* 215; Goble, 4 *Ill. L. Q.* 94; 5 *Ill. L. Q.* 36; Wilson, *The State*, 610-635; Amos, *Science of Jurisprudence*; Holland, *Jurisprudence*; Gray, *Nature and Sources of Law*; Salmond, *Jurisprudence*; Pollock, *First Book of Jurisprudence*.

³ 1 *Blackstone Commentaries*, 38.

⁴ 1 *Blackstone Commentaries*, 44.

⁵ Clark, *Practical Jurisprudence*, 134, 172, 186, 187.

which might be forgiven in view of the present status of international law, but it also would not include constitutional law and all other law adopted by the people of a country, as in the United States, for their own control; and no one can contend that these are not law. Hence the proper conclusion is that Blackstone's definition is wrong in this respect. Law is not a command. Austin, who followed Blackstone's definition when he said positive law "is set by a monarch or sovereign member, to a person or persons in a state of subjection to its author",⁶ had difficulty in fitting his definition to "laws explaining the import of existing positive laws, and the laws abrogating or repealing existing positive law". But Austin's difficulty does not stop here. The notion of a command does not generally prevail anywhere in the law. In the realm of civil law clearly the law is not issuing commands. It does not command people not to commit torts, nor to perform their promises, except in a few rare cases. The state has policemen, judges, and other officers of the law, but they are not ordinarily commanding people what to do and what not to do. If people do not do what they legally ought to do they may in the course of time feel the strong arm of the state, but that is a different thing from a command. In the realm of criminal law, the law might very easily have proceeded by way of issuing commands, yet even here it did not do so but followed the same scheme which it followed in the case of civil law. Leon Duguit was right when he said, "Law is not the command of a sovereign state, but a by-law governing a group."⁷ Hence Blackstone's definition is incorrect in both respects.

Other definitions of "law" worthy of mention are the following:

Law is that part of the established thought and habit which has been accorded general acceptance, and which is backed and sanctioned by the force and authority of the regularly constituted government of the body politic. WILSON.

The science of law is that organized body of knowledge that has to do with the administration of justice by public or regular tribunals in accordance with principles or rules of general character and more or less uniform application. POUND.

On the whole the safest definition of law in the lawyer's sense

⁶ 1 Austin, *Province of Jurisprudence*, 2.

⁷ 32 *Yale L. Jour.* 425. See also Dillon, *Law and Jur. of Eng. and Am.* 10.

appears to be a rule of conduct binding on the members of the commonwealth as such. POLLOCK.

The law may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of rules administered by courts of justice. POLLOCK and MAITLAND.

Law is a rule of conduct obtaining among a class of human beings and sanctioned by human displeasure. CLARK.

Law is a general rule of external human action enforced by a sovereign political authority. HOLLAND.

The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. GRAY.

It will be noted at once that the above definitions do not apparently agree. Is this because they have not all been reduced to the same lowest terms? Or is the apparent disagreement real? In order to answer this question it will be best to make an independent study of the subject of a correct definition of "law", and the best way to make such a study is to study the phenomena of the law. After such a study we may know what are the principal notions or concepts embraced in the law; and then by combining these we may be able to frame a general definition of law. In this way we shall try at least to make our definition conform to the facts instead of to make the facts conform to our definition.

The phenomena of the law are a form, or device, for external human social control; certain growing social interests which mark the boundaries of this control; legal rights, powers, privileges, and immunities (or capacities of influence), recognized by the law as one means of securing and protecting such social interests, and classified and studied as contracts, torts, crimes, property, equity, negotiable instruments, sales, public callings, constitutional law, damages, etc.; and courts and legal procedure (including pleading, evidence, and practice) another means given by the law for the protection of such social interests.

One of the phenomena of the law is contracts. Let us examine this for the purpose of discovering the true nature and scope of law. What do we have in a contract? We have a promise, or set of promises. But there is nothing magical in a promise. Most promises involve no social control. They have no legal consequences. But if a promise, or set of promises, is in such form as to become a contract, they do involve

legal consequences. The law then begins to exert some control. It does not "command" people to perform their contract promises any more than it commands them to make them. Yet it has evolved a scheme for making a promisor, or promisors, perform their promises. In the first place, it recognizes that the promisee, or promisees, have a legal right to the performance of the promises, and that the promisor, or promisors, are under a correlative legal obligation to perform the promises. Why? Because the promise in the form of a contract is one of such importance that its non-performance would be likely to have bad social consequences. It would tend to destroy the general security which is necessary for a stable and permanent social order, if people could not depend and rely upon promises of this sort. In other words, there is a social interest in general security involved in a contract which the law believes should be protected. In the second place, if the promisor, or promisors, do not discharge their legal obligations, but break their promises, the law offers the facilities of the courts and legal procedure to the man or men wronged. Sometimes the courts will decree what is called specific performance, but since it is now too late for performance at the time promised this is really specific reparation; ordinarily the courts give a judgment for damages as a substitute for what the promisee, or promisees, would have got had the promisor, or promisors, carried out their promises, and render certain assistance to help in the collection of the damages. These are the characteristics of the law so far as concerns contracts.

What we have just found to be true in the case of contracts is true of all the other branches of the law. If we should go thru all the other branches of substantive law—torts, crimes, property, agency, domestic relations, equity, sales, public callings, trusts, wills, constitutional law, negotiable instruments, corporations, insurance, mortgages, quasi-contracts, partnerships, suretyship, bankruptcy, conflict of laws, administrative law, etc.—we would find a scheme for controlling the conduct of people, where the law recognizes some social interest, by the recognition in one person of a right or some other capacity of influencing the conduct of another person (who thereby is under a corresponding legal duty), and by making the machinery of the law available for the use of the

injured person if the other person does not discharge his duty. In other words, the law here has the same characteristics as it has in contracts.

Thus four concepts stand out as the chief characteristics of the law:

- I. It is a scheme of social control.
- II. It is for the protection of social interests.
- III. It accomplishes its purpose by the recognition in persons of capacities of influencing the conduct of others.
- IV. It affords the machinery of the courts and legal procedure to help the person with capacity. "Order, through generality, equality, and certainty, and not compulsion, is the fundamental characteristic of the law." A correct definition of "law" would seem to be one which embraces all of these concepts and no others. The following, therefore, may be taken to be a true definition of law in the legal sense: *Law is a scheme of social control, for the protection of social interests, by means of capacities of influence, backed and sanctioned by the power of the state.*⁸

Justice. Justice may be defined as such an adjustment of the relations of human beings as to make all discharge all of their duties and other liabilities and all obtain all of their rights, privileges, powers, and immunities.⁹ What these are depends upon the social interests which society decides should have protection. Social justice at the present time recognizes more social interests than does legal justice. It consequently recognizes more rights and duties. It also recognizes no favored classes and protects groups within nations and nations as well as individuals. Legal justice has not as yet gone as far as this, but it is tending in the direction of social justice. As a matter of fact at the present time the law does not always give even legal justice. This is because it is not perfect, especially in the matter of courts and legal

⁸ It will be observed that Mr. Wilson's definition comes the nearest to being like the above definition. Most of the definitions have the concept of a sanction by the state in the form of courts and legal procedure. Some of them have the concept of social control. The concept of protection of social interests and the concept of recognition of capacities of influence as a means thereto are implicit in Mr. Wilson and Mr. Pound's definitions, but they seem to be ignored by other definitions.

⁹ "Justice consists in bringing the actions of each into harmony with the actions of all by a rule of general application instead of by an arbitrary act."—Kant—(Pound). Justice is "the liberty of each limited only by the like liberties of all."—Spencer.

"Justice means the satisfaction of everyone's wants so far as they are not outweighed by others' wants."—Ward.

procedure. England is much better in this respect than the United States, and the United States is probably better in respect to civil procedure than in respect to criminal procedure. The law does not always give justice: it is only a scheme for giving justice. If justice is truly administered human beings discharge all their duties and other liabilities and obtain all of their rights, privileges, powers, and immunities; if this results, social interests will be protected; and if social interests are protected, there is social control. Hence law may be defined, not only as a scheme of social control as it has been defined above, but as the science (that is the organized body of knowledge composed of principles, rules, and standards) which deals with the administration of justice.¹⁰ However, the writer prefers the definition first above given because it leaves less to inference.

¹⁰ "The science of law, that is, that organized body of knowledge that has to do with the administration of justice by public or regular tribunals in accordance with principles or rules of general character and more or less uniform application"—Pound, I *Lib. Am. Law and Prac.* 1.

"Law in the juridical sense is the body of rules (and principles) recognized or enforced by public or regular tribunals in the administration of justice."—Pound, I *Lib. Am. Law and Prac.* 8.

CHAPTER II

SOCIAL CONTROL, SOCIAL INTERESTS, AND LEGAL CAPACITIES

I. A Scheme of Social Control. From what has been said above we have learned that law is a scheme of social control. It is not the simple thing that a "command from a superior to an inferior" would be. It is a complicated contrivance. It is a connected combination of things. It is a scheme. It is a scheme of social control. It is not a scheme of individual control. The individual is free to control his own conduct so long as he does not come into legal relations with his fellow-men. He may choose his own vocation and his own domicile, and he may regulate his own conduct in a thousand other ways, without any interference by the law, provided he alone is concerned. But when his conduct affects the lives of his fellow-men, there is a possibility of control by the law. When such control begins will be considered under the next heading.

II. Social Interests. The law does not attempt to control all social relations. It controls them only when there is a social interest which requires such control. Social interests include the wants of the individual, the state, and the social group. As human beings come into closer and closer contact with each other their wants, or social interests, grow. Kant has truly said that if a man was alone in the world, or on a desert island, he would call nothing "his own" (*proprius*). What is true of external things is true of personality. A solitary human being would have no social interests. But the more people are thrown into contact with each other, the more social interests they have. People in rural districts do not have so many social interests as people in urban communities. People in small urban communities do not have so many social interests as people in large cities. The more complex the social life, the more social interests there are. In the early history of the world there were not so many social interests as there are today. In the early history of our own country there were not so many social interests as there are today. At first the only social interest recognized was that in the preservation of the peace. Later

there was a social interest in the maintenance of the *status quo*. The latter was a paramount social interest in Greek, Roman, and English history before the last part of the nineteenth century. In modern times numerous social interests have come to be recognized. When a new social interest shall be recognized is determined by the people of a state, but they have to express themselves thru their representatives in the halls of legislation and their judges on the bench. Hence the determination of a new social interest is a difficult matter. Society is made up of many conflicting and overlapping groups, like capitalists, laborers, farmers, consumers, producers, the learned, the ignorant, and the like. Representatives may be governed by self-interest, and judges may be influenced by bias and prejudice. Under such circumstances how can a new social interest be determined? What is the social interest, for example, in such matters as the tariff, taxation, child labor, liquor, and drugs? Yet there are many social interests about the recognition of which there can be no doubt. In a complex modern world if many social interests were not recognized and protected life would be intolerable; the human race, thru warfare, degeneracy, ignorance, and laziness, would soon destroy itself. Law, then, is a scheme of social control for the protection of those social interests which society thinks important enough to be protected.

The following is a classification by Pound of all the social interests which he thinks that Anglo-American law has recognized up to the present time:¹¹

A. General security

1. Personality

a. Physical person

- | | | |
|---------------------|---|---------------------|
| (1) Direct injury | } | —Physical existence |
| (2) Bodily health | | |
| (3) Freedom of will | | |
| (4) Mental health | | |
| (5) Nervous system | | |
| (6) Privacy | | |

b. Honor and reputation —Social existence

c. Belief and opinion —Spiritual existence

2. Domestic relations

a. Parental

b. Marital

¹¹ 3 *Dunster House Papers*, 3-4; 28 *Harv. L. Rev.* 343, 445.

- 3. Substance —Economic existence
 - a. Property
 - b. Freedom of industry and contract
 - c. Promised advantages
 - d. Advantageous relations
 - e. Free association
- B. Security of social institutions
 - 1. Domestic
 - 2. Religious
 - 3. Political
- C. General morals
- D. Conservation of social resources
 - 1. Natural resources
 - 2. Dependents and defectives
- E. General progress
 - 1. Economic (free invention, trade, property, industry)
 - 2. Political (free criticism and opinion)
 - 3. Cultural (free science, art, learning)
- F. Individual life

III. Legal Capacities. The law protects the social interests named above, not by sending someone out like a policeman to see that all people respect and care for them, but by recognizing in persons legal capacities of influencing the conduct of others and of requiring the assistance of the courts for the accomplishment of that result when it becomes necessary.

A legal capacity, or ability, is the capacity, or ability, given one person, because of some social interest, to control the conduct of others, thru the power of the state. Legal capacities include *A.* rights, *B.* privileges, *C.* powers, and *D.* immunities.¹²

All of the social interests which society has decided need protection are protected by means of some legal capacity, and in no other way; and this is as true in the realm of criminal law as it is in the realm of civil law. The law gives to the state certain public rights as it gives to individuals private rights. The first social interest historically recognized was that in the preservation of the peace. This social interest was protected civilly by giving to individuals, first, the right to personal safety; and, later, by giving them the right to the control and society of family and dependents, the right of property, the rights of freedom of locomotion, reputation, immunity from fraud, advantages open to the community

¹² 23 *Yale L. Jour.* 16; 26 *Yale L. Jour.* 710; 29 *Yale L. Jour.* 169.

generally, and finally privacy. This social interest also came to be protected criminally by giving to the state analogous public rights. The social interest in the general security of personality so far as it relates to honor and reputation is protected civilly by the private right of reputation and criminally by an analogous public right. Some social interests, like promised advantages, are protected by private rights only. Other social interests, like general morals and the conservation of social resources, are for the most part protected by public rights. Still other social interests are not protected by rights, but by privileges, powers, or immunities. The social interest in the freedom of the will is generally protected by the privilege of avoiding a contract. The economic existence is often protected by powers and immunities and privileges as well as by rights. However, the most important legal capacities are legal rights, and social interests are generally protected by them. The curricula of our law schools and most law books are mostly concerned with legal rights. A scheme of social control which accomplishes its purposes by means of legal capacities is a roundabout scheme, but since it is the way of the law it must be considered if we would understand law.

With the exception of infants, insane persons, and certain other persons under disability, the law, it is said, has given to natural persons full legal capacity, that is, they have or may have all the rights, tho not all the privileges, powers, and immunities, known to the law. Corporations have only the legal capacity given to them expressly or impliedly by their charters of incorporation. A sovereign state has legal capacity against persons, but persons do not have legal capacity against it except as it has given its consent.

Correlative with the capacity, or ability, to influence the conduct of others is the liability to have such conduct influenced. Thus correlative with every right is a duty; with every privilege, a no right; with every power, a no privilege; and with every immunity, a no power. Normal adult natural persons have full legal liability, and this is sometimes what is meant when it is said that they have full legal capacity. It has already been pointed out that corporations do not have full legal capacity. They also do not have full legal liability. They have incapacities differing from those

of natural persons. They can do only those things which can be done by an agent. There are certain crimes which they cannot commit. They are not liable for *ultra vires* acts, that is, acts in excess of the legal capacities given them by their charters. However, coincident with the development of the notion that corporations are real entities, there is developing the notion that they should be treated like natural persons so far as concerns liability; and that the doctrine of *ultra vires* is unsound.¹³ The capacities of agents and the liabilities of agents and principals for the acts of agents are limited by the doctrine of the scope of authority. Partners and the members of other unincorporated organizations have in the past been treated as individuals, but there is a tendency developing to treat these organizations as legal entities.

¹³ See articles on this subject by Edwin M. Borchard in *Yale L. Jour.* for 1924-1925 and 1925-1926.

CHAPTER III

RIGHTS—IN GENERAL

A. Right. The greatest of the legal capacities is a right.

1. Definition. A legal right is the legal capacity, or ability, to enforce action or forbearance (performance) by another. Illustrations of rights are contracts, property, personal safety, reputation, etc.

A right is one's affirmative claim against another. HOHFELD.

A right is the legal relation of two where society enforces action or forbearance for one. CORBIN.

A legal right is the capacity residing in one man of controlling, with the assent and assistance of the state, the action of others. HOLLAND.

The correlative of a right is a duty. A legal duty is the legal liability to perform some act or forbearance for another. When a legal duty is *in personam* it may be called a legal obligation.

A legal duty is the legal relation where society enforces action or forbearance by one. CORBIN.

A legal duty exists where one is bound to do or not to do something because of some interest, social, public, or private, which the law undertakes to maintain through the power of the state invoked in judicial proceedings. POUND.

2. Elements. The elements of a right are four: *a.* the person who has the legal capacity to enforce performance; *b.* the person under legal liability to render performance; *c.* the conduct (act or forbearance) to which one is entitled and which the other owes; and *d.* the object to which such conduct relates.

a, b. Persons. Persons are those legal entities to which the law gives legal capacity and liability. Persons are such, not because human beings, but because of their legal capacities and legal liabilities. When slavery was recognized, slaves were not persons, yet they were human beings. Neither all human beings are persons, nor are all persons human beings. Human beings sometimes act collectively. Such groups may be recognized as entities and given legal capacities. Hence persons are classed as natural persons and artificial (juristic) persons. Artificial persons are the state, corporations, partnerships, and any other organizations (like labor unions) recognized as legal entities.

A corporation is an artificial legal entity, or juristic person, composed of one or more individuals and possessing a personality and legal capacity differing from that of such individuals.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law; being the mere creature of the law it possesses only those attributes which the charter of its creation confers upon it either expressly or as incidental to its very existence. MARSHALL.

The notion once prevailed, and Marshall's definition embodies the notion, that a corporation is a fiction, but more recently the notion has been growing that a corporation, as well as a partnership, labor organization, or other group organization, has a personality and is as real as an individual.¹⁴ Corporations are classed as public, private, and quasi-public.

A partnership is a voluntary association of two or more persons as co-owners for the purpose of carrying on a business with a view to profit. They may be classified as ordinary partnerships, limited partnerships, and joint stock companies.

Persons may also be principals or agents.

Agency is a legal relation, founded upon the contract of the parties or created by law, by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. MECHEM.

c. Conduct. The conduct which is the element of a legal right consists either of some positive act, as in a contract, or of some negative forbearance, as in the case of rights *in rem*. Acts are more liable to produce rights, or to bring persons into relations with things, than to be the element of a right, and they therefore will have more extended consideration in another place. For present purposes it is enough to say that acts may be void, voidable, or valid. A void act amounts to nothing so far as concerns performance, but it may have other consequences. A ceremony of marriage between two persons, one of whom is already married, is a nullity, but it will constitute the offense of bigamy. A voidable act is one which a party may perform or not at his option. Such an act is one promised by an infant. A valid act is one whose performance is obligatory.

d. Objects. The fourth element of a legal right is an object, or objects. This object, or objects, may be either per-

¹⁴ Pollock, *First Book of Jurisprudence*, 116; *United Mine Workers v. Coronado Coal Co.*, 42 *Sup. Ct.* 570.

sonality, or an external thing, or things. Personality is the object in the natural rights *in rem*. Things are the objects in the property rights *in rem* and *in personam*. The Roman law classified things as corporeal and incorporeal. The common law classifies things as (1) land, or corporeal hereditaments, (2) easements, franchises and rents, or incorporeal hereditaments, both objects of real property ownership, (3) chattels real (leaseholds and emblements), and (4) chattels personal, which in turn are classified as (a) corporeal, or in possession, and (b) incorporeal, or in action—all objects of personal property ownership. Corporeal chattels are also classified as animate and inanimate, and incorporeal chattels as debts, secured and unsecured, and various other intangible things. Since things are the objects of specific rights, to be considered hereafter, further discussion of them will be postponed until such specific rights are discussed.

3. Classification. The most general classification of rights is as public and private. These are classified as antecedent and remedial. Antecedent rights are classified as *in rem* and *in personam*. Remedial rights are all *in personam*. Rights *in rem* and *in personam* are still further classified. The following table shows this classification:¹⁵

A. Rights

1. Public—Criminal law

Constitutional law
Administrative law
Municipal corporations
International law

2. Private

a. Antecedent rights (primary rights)

(1) *In rem*

- (a) Personal safety
- (b) Society and control of family and dependents
- (c) Property
 - (1') Real
 - (2') Personal
- (d) Freedom of locomotion
- (e) Reputation
- (f) Immunity from fraud
- (g) Advantages open to community
- (h) Privacy

¹⁵ Holland, *Jurisprudence*, 160 *et seq.*

- (2) *In personam*
 - (a) Contracts
 - (b) Quasi-contracts
 - (c) Trusts
 - (d) Bailments
 - (e) Public callings
 - (f) Other fiduciary relations
- b. Remedial rights (secondary rights) *in personam*
 - (1) Preventive
 - (a) Injunction
 - (b) Prohibition
 - (c) Exemplary damages
 - (2) Redressive
 - (a) Restorative
 - (1¹) Reformation
 - (2¹) Rescission
 - (3¹) Specific performance
 - (4¹) Ejectment
 - (5¹) Replevin
 - (6¹) *Mandamus*
 - (7¹) *Habeas corpus*
 - (8¹) *Quo warranto*
 - (b) Compensatory—Damages

{	Nominal	{	Direct
	Substantial		Consequential
- (1) *Ex contractu*
 - (a¹) Debt
 - (b¹) Covenant
 - (c¹) Special *assumpsit*
 - (d¹) General *assumpsit*
- (2) *Ex delicto*
 - (a¹) Trespass
 - (b¹) Case
 - (c¹) Trover

CHAPTER IV

SPECIFIC RIGHTS

THE present chapter is devoted to a definition and discussion of the specific rights classified above.

a. Antecedent rights are rights to conduct for its own sake, that is, before any wrongdoing, and therefore they may also be called primary rights.

b. Remedial rights are the rights to judicial remedies to prevent or to redress violations of antecedent rights, and may therefore be called secondary rights.

(1) "A right *in rem* is a right against another particular individual accompanied by similar rights against all or nearly all others." (CORBIN.) All legal rights *in rem* are antecedent. The conduct called for by such rights is negative forbearance.

(2) "A right *in personam* is a right against another particular individual unaccompanied by similar rights against all or nearly all others." (CORBIN.) The conduct called for by such a right is generally a positive act. Some antecedent legal rights are *in personam* and all remedial rights are *in personam*.

1. Public rights are those which the state asserts for itself. Public law includes criminal law, constitutional law, administrative law, the law of municipal corporations, and international law.

A crime is a violation of a public antecedent duty *in rem*.

Constitutional law deals with the framework of government, the functions and sovereign powers of its departments and subdivisions, and the duties of the state towards itself and its own citizens.

Administrative law deals with such matters as revenue, army and navy, colonies and dependencies, statistics, registration, naturalization and granting of charters, sanitation, poor laws, asylums, coinage, weights and measures, professions, trade, foreign commerce, public callings, prisons, maintenance of order, detection of crime, lighthouses, etc., and the promotion of the intellectual and moral welfare of the people.

"Municipal Corporations are bodies politic, created by the

sovereign authority of state or nation, for the primary purposes of carrying on a local and subordinate government." SCHOULER.

International law concerns states as legal entities in their relations with each other. In the past it has had no arbiter beyond the parties themselves.

2. Private rights are those which reside in natural and artificial persons in their private capacity. Violations of the correlative duties are either torts, or breaches of obligations *in personam*, like breaches of contract, etc.

Breaches of obligations, torts, and crimes are all legal wrongs. They are violations of legal duties and obligations. Some wrongs are crimes only, as for example getting drunk and being disorderly on the street. Some wrongs are torts only, as where a person unintentionally collides with another and injures him. Some wrongs are breaches of contract, or quasi-contract, or trust, or bailment, or public calling only. Other wrongs are both crimes and torts, as where one intentionally runs into another and knocks him down. Other wrongs are both torts and breaches of contract, as where a railway which has made a contract to carry a passenger safely is guilty of negligence. In such case the railway is also guilty of a breach of a public calling obligation. If in such case the railway had been guilty of an assault and battery by the act of one of its servants, the same wrong would have been a crime as well as a tort, breach of contract, and breach of public calling obligation. Suppose that A, purporting to act for B as his agent, collects from C a debt which C owes B, and then refuses to pay the money over to B. The law will impose an obligation on A to pay the money over. This would be a quasi-contract. A would be guilty of the tort of fraud against C, and of the crime of obtaining money under false pretense against the state, but he would be guilty of neither a tort, breach of contract, nor any other legal wrong than breach of quasi-contract against B. A tort is a violation of a private antecedent duty *in rem*. There are many different kinds of torts, and they will be referred to further in connection with the consideration of such duties. A breach of contract is a violation of a private antecedent obligation *in personam* created by law as the result of a promise, or set of promises, under seal, of record, or in the form of agreement.

A breach of quasi-contract is a violation of a private antecedent obligation *in personam* created by law, generally because of some unjust enrichment. A breach of trust is a violation of a private antecedent obligation *in personam* created by law where one person holds the legal title to something in trust for another. A breach of a bailment obligation is a violation of a private antecedent obligation *in personam* created by law where there is a rightful possession of chattels by one not the owner. A breach of a public calling obligation is a violation of a private antecedent obligation *in personam* created by law where there is a business affected with a public interest, as in the case of a virtual monopoly.

(a) **Personal Safety.** The right of personal safety is the right of a person to be exempt from injury and danger of injury to his person from another's conduct. It is a private antecedent legal right *in rem*. The object of this right is the physical person. The conduct called for by this right is forbearance from attempting to do hurt to a person within reach; forbearance from hitting or touching a person intentionally, recklessly as in rudeness, or in the commission of a crime; forbearance from wounding or disabling a person by any dangerous substance or animal kept, or by the negligent condition of premises. All human beings have this right. It is an innate natural right, and is acquired at the moment of birth. All human beings owe this duty. A violation thereof is called a tort. The tort is the tort of assault if the injury to the person is only attempted, the tort of battery if it is actually inflicted, the tort of negligence if the injury results from the failure to exercise due care, and the tort of escape of dangerous thing if the injury is caused by dangerous instrumentality. The right of personal safety terminates with death, and it may be partially waived or temporarily forfeited during life, but a person cannot completely renounce it in modern times. The above right and duty were the first known to the law.

(b) **Family Rights.** The right to the society and control of family and dependents includes the marital, parental, tutelary, and dominical family rights. Marital rights are those incident to the status of marriage. Parental rights are those incident to the relation of parent and child. Tutelary rights are those incident to the relation of guardian and ward. Dominical rights are those which the head of the family has

to the services of wife, child, ward, and servants. All of these rights are private antecedent legal rights *in rem* so far as concerns outsiders, but they are also private antecedent legal rights *in personam* as to the members of different relations. Dominical rights are also proprietary. The object of these rights is a status or relation. The conduct required is, in case of the rights *in rem*, forbearance from depriving a husband or wife of the society of the other and from being criminally intimate with a wife and in some states with a husband; forbearance from interfering with the custody and control of children and wards; and forbearance from depriving the head of the family of the services of the other members; and, in the case of the rights *in personam*, the act of *consortium*, the wife's keeping herself from levity and adultery, the act of support of wife by husband, and in some states of parent by child and child by parent, and the act of rendering service. Each member of the family is entitled to the conduct described and is under the described duties *in personam*, and all men are under the duties *in rem*. The family rights are natural rights, and are acquired: the marital, on marriage; parental, on birth or adoption of child; tutelary, on appointment. Violation of the duties *in personam* are not torts. Damages cannot be recovered therefor. But other remedies, like legalized self-help, as in buying on another's credit, and in chastisement, divorce, and a petition for the restitution of conjugal relations, are available. Marital rights terminate with death or divorce; parental with death, emancipation, full age, marriage, or judicial sentence; tutelary with death, resignation or removal, full age, or marriage. The family rights and duties were the second recognized by law.

(c) **Property.** The right of property was the third historically recognized by law. The right of property is the capacity given by law to persons to influence the conduct of others with reference to external objects. It has three grades: custody, possession, and ownership. Custody is the "mere physical holding of or physical control over a thing", as in the case of something held by a servant. Possession is custody coupled with the mental element that one is holding for his own purposes, as in the case of bailment. In custody the object of the law is to secure the physical person by securing

the relation of the physical person to an object; in possession, to secure a certain interest of the possessor in the object. Ownership is an extension of the idea of possession to use and disposal. In ownership, "the law secures the owner's interest of substance—his economic existence."

At common law, property is of two kinds: real property and personal property. The general object of real property is land. The general object of personal property is chattels. One may own the chattels themselves, but he cannot own land; he may have only an estate or interest therein.

The following is a classification of common law estates and interests in another's land, not estates:

Estates:

- I. As to quantity of interest
 - A. Freeholds
 1. Of inheritance
 - a. Fee simple
 - b. Fee tail
 2. Not of inheritance
 - a. Conventional
 - (1) Life
 - b. By operation of law
 - (1) Curtesy
 - (2) Dower
 - B. Less than freeholds
 1. Estates for years
 2. Estates from year to year
 3. Estates at will
 4. Estates by sufferance
 - II. As to time of enjoyment
 - A. In possession
 - B. In remainder
 - C. In reversion
 - III. As to number of owners
 - A. Severalty
 - B. Joint-tenancy
 - C. Coparceny
 - D. In common

Interests in another's land, not estates:

- I. Profits
- II. Easements
- III. Licenses
- IV. Covenants running with the land
- V. Equitable servitudes

The following is a classification of common law:

Chattels:

- I. Chattels real
 - A. Leaseholds
 - B. Emblements
- II. Chattels personal
 - A. Corporeal
 1. Animate
 - a. Wild animals
 - b. Domestic animals
 2. Inanimate
 - a. Money
 - b. Ships and vessels
 - c. Dead bodies
 - d. Miscellaneous (furniture, groceries, clothing, etc.)
 - B. Incorporeal
 1. Debts and other claims for money
 - a. Unsecured
 - (1) Debts of record
 - (2) Specialties
 - (3) Simple contracts
 - (4) Quasi-contracts
 - (5) Remedial
 - (6) Bequests
 - (7) Stock
 - (8) Warranties
 - b. Secured
 - (1) Liens
 - (2) Pledges
 - (3) Mortgages
 2. Other contracts
 3. Good-will
 4. Trademark
 5. Copyright
 6. Patent
 7. Services of servants, children, etc.

(1¹) Real property is the right of a person to be allowed by other persons to possess, use, and dispose of (freehold) estates in land (corporeal hereditaments), and easements, etc. (incorporeal hereditaments). It is a private antecedent legal right *in rem*. The objects of the right are land (which includes *fructus naturales*, some *fructus industriales*, and fixtures), easements, franchises, rents, and heirlooms, etc. The conduct required is forbearance from interfering with use, possession, or disposal. Only those persons are entitled to this sort of a right who have acquired it in some way. It is

not a natural right. It may be acquired by secondary acquisition by operation of law in case of descent, adverse possession, estoppel, accretion, reliction, marriage, and judicial sale, and by act of the parties in case of public grant, private conveyance, and will. After one or more persons have acquired a right of real property in any one of these ways all other persons have acquired the duty to give the conduct indicated. Real property is absolute when one has acquired the exclusive and unqualified right to possess, use, and dispose of some object of ownership. It is qualified when he has anything less. The duty of course corresponds with the right. Violations of real property are torts. A violation of possession is a trespass; a violation of riparian use, violation of water rights; a violation of the right of disposal by false and malicious representations, slander of title; a false representation made knowingly and reasonably relied and acted upon, deceit; failure to exercise diligence where one should see that harm is likely to result and it does result, negligence; flooding the land of another other than in the natural way by water collected on his own land, or by changing the course of currents, nuisance; causing one's land to cave in by excavations underneath the same, removal of subjacent support; causing one's land to cave in by excavations close to the boundary, removal of lateral support; a wrongful and lasting injury to the inheritance by owner of a particular estate, waste. All the rights of real property may be lost by private grant, judicial sale, taxation, eminent domain, exercise of the police power, confiscation, accretion, estoppel, and adverse possession. Estates of inheritance may also be lost by escheat, and easements by abandonment.

(2¹) Personal property is the right of a person, either to the positive acts or to the forbearance of other persons, as respects any of the external things capable of ownership, except such as are the objects of real property. Personal property may be absolute or qualified in the same way that real property may be. It is a private antecedent right *in personam* when the conduct is a positive act. The objects of personal property are chattels real (leaseholds and emblements) and chattels personal, which are either corporeal or incorporeal. Corporeal chattels in turn are either animate (domestic animals, wild animals), or inanimate (money, ships,

dead bodies, and ordinary articles of merchandise), and incorporeal chattels are debts either unsecured (of record, specialty, simple contract, remedial obligations, bequests, stock, warranties, etc.), or secured (liens, pledges, mortgages), or non-debt intangibles (other contracts, good-will, trademark, copyright, patent). The conduct, in the case of rights *in rem*, is forbearance from interfering with the possession, use, and disposal of any of the above objects of ownership, and in the case of rights *in personam* to do some specific act. All rights *in personam* may thus be classed as personal property. The right of personal property also must be acquired, but anyone may acquire it either severally or jointly with others. After so acquired all others, in the case of rights *in rem*, are under duty; and particular individuals, in the case of rights *in personam*, are under duty. Personal property may be acquired by original acquisition, by occupancy (unowned things), accession, confusion, intellectual labor (trademarks, copyrights, and patents), contract, quasi-contract, bailment, public calling, trust, and remedial obligations; and by secondary acquisition by act of law by confiscation, succession, judgment, intestacy, insolvency, marriage, and adverse possession, and by act of the parties by gift, will, assignment, indorsement, and sale. Violations of personal property are breaches of contract, quasi-contract, trust, and bailment and public calling obligations in the case of rights *in personam*, and torts in case of rights *in rem*. The most common torts are conversion, deceit, infringement of trademark, etc., negligence, nuisance, and trespass. Personal property may be lost by confiscation, succession, judgment, intestacy, insolvency, marriage, adverse possession, gift, will, bailment, assignment, indorsement, sale, taxation, eminent domain, and the exercise of the police power. Rights *in rem* may also be lost by occupancy, accession, and confusion, and rights *in personam* by discharge, which embraces the happening of conditions, performance, new contract, cancellation and surrender, alteration, breach, release, accord and satisfaction, arbitration and award, judgment, bankruptcy, statute of limitations, and change in law.

(d) **Locomotion.** The right to freedom of locomotion is the right of a person to go where he pleases so long as he does not interfere with the coördinate rights of others to do

the same. It is an antecedent legal right *in rem*. The object of this right is personality. The conduct required by it is forbearance from imposing total restraint upon a person's freedom of locomotion except in making lawful arrest. Every human being has the right, and all human beings are under duty. The right is a natural innate right and is acquired at the moment of birth. The violation of it is the tort of false imprisonment. The right terminates with death, may be forfeited by wrongdoing, and may be partially waived by contract. It was the fourth right historically recognized by the law.

(e) **Reputation.** The right of reputation is the right of a person not to have diminished in the community his good name, or the well-founded respect of others for him. It is an antecedent legal right *in rem*. It was the fifth historically recognized by the law. The object of the right is also personality, but honor and reputation instead of the physical person. The conduct required by it is forbearance from publishing defamation which is either actionable *per se* or not actionable *per se* if it causes special damage. Every human being has the right, and all human beings are under duty. The right is a natural innate right, acquired at the moment of birth. A violation of the right is the tort of slander if the defamation is oral, and the tort of libel if the defamation is in writing, print, or figure. The right terminates with death, and can be lost during life only by loss of character.

(f) **Immunity from Fraud.** The right to immunity from fraud is the right of a person not to be induced by intentional false representations to assent to a transaction which causes him damage. It is a private antecedent legal right *in rem*. The object of the right is generally an external thing, and therefore the same as the object of property. Fraud, consequently, is generally a tort resulting from a violation of a property duty. But the right to immunity from fraud is broader than the right of property and hence should have some separate treatment. The conduct required is forbearance from making a false representation in regard to a material fact, with knowledge of its falsity, and with intent that it shall be acted upon, to one who is ignorant of its falsity and believes it to be true and who reasonably relies and acts upon it to his damage. Everyone has a right to such conduct, and

all are under duty to render it. A representation may be either an inducement to a contract, when—if it is false as above outlined—it is a tort; or a warranty, which is a contract collateral to another principal contract; or a promissory condition, in either of which last two cases (but not if a casual condition)—if it is false—there is a breach of contract. The right to immunity from fraud is an innate right, acquired at the moment of birth, and a violation of it is the tort of deceit, or fraud. The right terminates with death.

There is no right to immunity from duress and undue influence, and therefore they are not torts, and yet if a contract is procured by duress, or by undue influence, it is as voidable as one procured by fraud. Duress and undue influence, like fraud, create powers and privileges, but they have no further legal effect. Privileges and powers will be discussed later.

(g) **Advantages Open to Community.** The rights to the advantages open to the community generally include the rights of persons to perform without molestation all lawful acts and to enjoy the privileges which attach to them as citizens, and may be classed as the right to livelihood, the right to highways, the right to freedom from abuse of legal process, and the right to contract. They are private antecedent legal rights *in rem*. The object of these rights is, respectively, occupation, public highways and rivers, machinery of the law, and a relation. The conduct also, respectively, is forbearance from interfering with the pursuit by which a person gains his livelihood to his damage, forbearance from obstructing the public highways and navigable rivers to his damage, forbearance from instituting a prosecution with malice and without reasonable probable cause for an offense falsely charged to have been committed (to his damage if not defamatory), and forbearance from procuring breach of contract, or procuring by force refusal to contract, by a third person to the first's damage. These rights are innate and are acquired at the moment of birth. A violation of the duty to permit contract is the tort of procuring breach or refusal to contract; of the duty not to obstruct highways, nuisance; of the duty not to abuse legal process, malicious prosecution; of the duty not to interfere with one's livelihood, unfair competition or some other well-recognized tort. The rights terminate with death

and may be waived by contract so far as not against public policy.

(h) **Privacy.** The right of privacy has been so recently established that definition and explanation should not be attempted. It seems at least to include the right of a person to have others refrain from using his name or picture without his consent for purposes of trade or for advertising purposes. It is a natural innate private antecedent legal right.

(a) **Contract.** A contract is a legal obligation (private antecedent legal right *in personam*), created by the law, as a result of a promise, or set of promises, under seal, of record, or in the form of agreement. A contract under seal is one with a promise, or set of promises in writing, sealed and delivered. An agreement is the meeting of at least two minds in the objective sense in one and the same intention by means of an offer and an acceptance. It is the expression of assent. An offer is an act giving the offeree the power to create an agreement by the acceptance of a conditional promise. It is an act, whereby one party, by proposing to give a promise to another for a promise or other act of the other, gives the other by acceptance the power of creating an agreement. It is a proposal by one person to give or do something for an act other than a promise or for a promise of another. The person making an offer exercises a privilege, while the person making the acceptance also exercises a power. An acceptance is the creation of an agreement by the expression of assent to the terms of an offer pursuant to the power given by the offer. It is the exercise by the offeree of the power given to him by the offeror to create an agreement by the expression of assent to the terms of the offer. It is an absolute and unconditional accession to the identical terms of the offer, either by an act other than a promise or by a promise as required by the offer. The agreement, to give rise to a valid contract, must be definite and certain; be made by competent parties; be made with intent to create legal relations; be free from mistake, fraud, duress, and undue influence; rest upon sufficient consideration; have a lawful object; and be in the form required by the law of evidence, where there is any requirement. If all these conditions have been met the law will create a legal right *in personam* in favor of one or both of the parties, and a correlative legal obligation upon the other.

The elements and characteristics of the right have already been considered in connection with personal property of which it is a species.

Contracts is also a generic term, and there are many different species of contracts. These species of contracts may be classified in different ways. Classified according to the nature of the agreement they are unilateral and bilateral, and express and inferred. A unilateral contract is one created by a promise on one side given for an act other than a promise on the other side. A bilateral contract is one created by a promise on one side given for a promise on the other side. An express contract is one all of whose terms have been expressly assented to. An inferred contract is one in which either the act of acceptance or some term in the promise is inferred as a fact. Classified according to the number of parties, contracts are joint, several, and joint and several. Classified according to formalities, contracts are specialties, written, and oral. Classified as to performance, contracts are executed and executory, and executory contracts are conditional and unconditional. Classified as to validity, contracts are valid, voidable, void, and unenforceable. Classified as to subject-matter, contracts are principal and accessory. Principal contracts include those which affect property rights and those which affect personal rights. Those affecting property rights are contracts to convey, to lease, to sell, to make a bailment, to insure, and to loan. Those affecting personal rights are contracts to marry and for services, as for example as servant, bailee, public calling, profession, agent, etc. Accessory contracts include suretyship and guaranty, warranty, pledge, and mortgage.

(b) **Quasi-Contracts.** A quasi-contract is a legal obligation (private antecedent legal right *in personam*) created by law because of some unjust enrichment or analogous situation. The law imposes such obligations where a benefit has been conferred by one upon the other because of request, fraud, misrepresentation by one in confidential relation, undue influence, duress, and reliance on an unenforceable contract or on other legal relations. Other obligations of this sort are obligations of statute, custom, and record. The obligation requires restitution or its equivalent.

(c) **Trust.** A trust is a legal obligation (private antecedent legal right *in personam*) created by law because one person holds the legal title to something for the use of another, either where there has been a conveyance, or a declaration of trust, in this form, or where equity demands it.

(d) **Bailment.** A bailment obligation is a legal obligation (private antecedent legal right *in personam*) created by law because of the rightful possession of chattels by one not the owner. The chief bailment obligations are an obligation to exercise diligence, varying with the bailment, in caring for the chattel, and an obligation to deliver the same to the person rightfully entitled to it.

(e) **Public Calling.** A public calling obligation is a legal obligation (private antecedent legal right *in personam*) created by law because a business is affected with a public interest, generally because of virtual monopoly. The public calling obligations are the obligations to serve all of the class of service, with reasonably adequate facilities, without discrimination, and for reasonable compensation; and an obligation to exercise diligence of some sort.

b. **Remedies.** Remedial obligations are preventive and redressive, and redressive obligations are restorative and compensatory.

(b) **Damages** are a private remedial right *in personam* to compensation for the injury caused by the violation of a private antecedent legal duty *in rem* or *in personam*. This violation of duty is a legal wrong and is the result of a tort, or a breach of one of the legal obligations. The compensation is nominal where the purpose is simply to establish a legal right, and substantial where substitutive redress is given. Substantial damages are direct and consequential. Direct damages are substantial, compensatory damages for such immediate and proximate injuries as necessarily and invariably result (general damages), and as result only in the particular instance (special damages), from a breach of contract or a tort. Consequential damages are substantial, compensatory (special) damages for such proximate injuries as are certain, and, tho not necessary and immediate, in contracts broken, may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract as a probable result of the breach of it, and, in torts,

are the proximate consequence of the wrongful act. Damages are a compensatory redressive remedial obligation.

(a) Other redressive remedies are restorative. The chief of these are reformation, rescission, specific performance, ejectment, and replevin. The preventive remedies are injunction and prohibition. Reformation, rescission, specific performance, and injunction are called equitable remedies because developed by the courts of equity, or chancery. They are all private remedial rights *in personam*; reformation, to reform a written contract to make it conform to a valid oral one where by mutual mistake, or mistake and fraud, the contract has not been correctly reduced to writing; rescission, to set aside a contract voidable for fraud, misrepresentation, duress, undue influence, infancy, or insanity; specific performance, to compel the fulfillment of a valid promise where the remedy for damages is inadequate and the contract is fair, free, mutual, and capable of being presently executed; injunction, to restrain the doing of an illegal act where the remedy for damages would be inadequate; ejectment, to regain the possession of land wrongfully detained; replevin, to regain the possession of chattels wrongfully detained.

In addition to the above remedies there are some remedies called extraordinary legal remedies. They are *mandamus*, prohibition, *quo warranto*, and *habeas corpus*. *Mandamus* is like specific performance, except that it is a writ issued in the name of the state or sovereign and must be directed to some inferior court, public officer, or corporation, and can be used to redress only obligations or duties imposed by law. Prohibition is like injunction, except that it is a writ issued by a superior court to an inferior court or tribunal to prevent it from usurping or exceeding its jurisdiction, and not to private parties. The ancient writ of *quo warranto* was a high prerogative writ issued in the name of the king against anyone who usurped or claimed an office or franchise. The modern information in the nature of *quo warranto*—criminal in form but civil in nature—is presented to a court of competent jurisdiction by the public prosecutor to inquire into the legality of the claim which a party asserts to an office or franchise. The writ of *habeas corpus* is a summary remedy to relieve against illegal restraint of personal liberty.

The proper action for procuring equitable relief is a bill

in equity; for obtaining extraordinary legal remedies, prerogative writs; for obtaining damages, in the so-called code states a formless action, called the civil action, and under the common law procedure either a tort action or a contract action. The contract actions are covenant, for damages for breach of a contract under seal; debt, for the recovery of a sum certain due by simple contract; specialty, record, or statute; special *assumpsit* (an action on the case in the nature of deceit) for the recovery of damages for the breach of an express contract and breaches of some obligations not contracts imposed by law (public callings, etc.); and general *assumpsit* (an action on the case in the nature of debt) for the recovery of damages for the breach of quasi-contracts and inferred contracts. The tort actions are trespass for the recovery of damages for direct, forceful injury to person or possession of property (in the case of property by one not in possession); trespass on the case for damages to personal property by independent agents of harm, or negligence; trover (an action on the case in the nature of detinue) for damages for the conversion of chattels; case (a residual action in torts comparable with *indebitatus assumpsit* in contracts) for the recovery of damages for slander, libel, nuisance, deceit, waste.

CHAPTER V

PRIVILEGES, POWERS, AND IMMUNITIES

B. Privilege. A legal privilege is the legal capacity (or ability) to do as one pleases in a certain matter, because he is under no legal duty to another.

A privilege is one's relation to another where he may conduct himself as he pleases in a certain matter. CORBIN.

A privilege is one's freedom from the right or claim of another. HOHFELD.

A privilege is an immunity from liability for what but for the privilege would be a violation of duty. POUND.

Illustrations of privileges are innumerable. A person has the privilege to go onto his own land, to make or not to make an offer, to accept or not to accept an offer, to cut short his vacation, the privilege of self-defense, the privilege against self-crimination, the privilege of disaffirmance of voidable contracts, etc.

The correlative of a privilege is no right. No right is the legal liability to have another do as he pleases, or the incapacity to control the conduct of another, in a certain matter.

No right is the legal relation of a person in whose behalf society enforces nothing of another. CORBIN.

For example. A has no right after he has given B the privilege of going on his land. Strangers have no right to have the owner not go on his own land.

C. Power. A legal power is the legal capacity (or ability) to change or create new legal capacities or liabilities for another or others.

A power is the legal relation of one to another where one by his voluntary act may create new legal relations between them, or between the other and a third. CORBIN.

A power is one's affirmative control over a given legal relation as against another. HOHFELD.

For example. An agent has the power to bind his principal; an offeree, the power of rejection and the power of acceptance; and an offerer, the power of revocation. Other powers are power of sale, power of appointment, power of assignment, power appendant, power in gross, power of ratification, power of disaffirmance, etc.

The correlative of a power is no privilege. No privilege is the legal incapacity to do as one pleases, or the legal liability to have another create new legal capacities or liabilities for him.

No privilege . . . is the legal relation where one may be brought into new legal relations by the voluntary act of another. CORBIN.

For example. An offerer is legally liable to have the offeree create an agreement for him unless he meanwhile exercises his power of revocation, and if he has made an offer under seal, or for consideration, he has no power left in himself. A principal stands in the same situation to his agent, and an owner to one to whom he has given a power.

D. Immunity. A legal immunity is the legal capacity (or ability) to be free from the legal power or control of another.

An immunity is the legal relation where one has no legal power to affect at least one of the legal relations of another. CORBIN.

An immunity is one's freedom from the legal power or control of another as regards some legal relation. HOHFELD.

For example. One who has an option, one who is exempt from taxation, or execution, or one who has a contract whose obligation cannot be violated, has an immunity.

The correlative of immunity is no power. No power is the legal liability not to be able, or legal incapacity, to create new legal capacities or legal liabilities for another.

No power . . . is the legal relation where by no voluntary act of his own one can extinguish an existing legal relation of another. CORBIN.

For example. One who has given an option; a state which has given a person exemption from taxation, or which desires to violate the obligation of a contract.

The above legal rights, privileges, powers, and immunities compose what is called substantive law, as distinguished from adjective law or legal procedure. Substantive law may be defined as the law of public and private antecedent and remedial legal rights, and of legal privileges, powers, and immunities. It includes all legal capacities and liabilities.

E. Facts: Acquisition and Loss of Capacities and Liabilities. The means whereby persons acquire legal capacities and liabilities are called facts. Facts are either events or acts.

An event is an occurrence which takes place independently of human will. POUND.

An act is an exertion of the human will manifested in the external world. POUND.

An act is a voluntary physical movement of a human being. The greater number of acts and events are of no legal import, but almost any act or event is liable to have legal import. An apple falling from a tree on a man's own land has no legal import, but if such apple should fall from a branch projecting over his neighbor's land on to his neighbor's ground it would cause all sorts of legal questions to arise. Proximate consequences are reckoned as part of an act. When acts have legal consequences because such was the intention of the persons who performed them and the law gives effect thereto, they are called legal transactions. Examples of such legal transactions are contracts, conveyances, and declarations of trust.

Facts are also operative and evidential. An operative fact is one which causes new legal capacities or legal liabilities.

An operative fact is one which causes new legal relations. CORBIN.

An evidential fact is one which tends to prove the existence of some other fact. CORBIN.

An act may also be an element of a right, a matter already discussed.

Legal Relation. An important fact is the fact of legal relation. A legal relation is a sort of permanent fact, and therefore, either alone or in connection with other operative facts, gives fairly permanent legal capacities and liabilities.

A legal relation is where stated consequences follow to persons from operative facts. CORBIN.

Some of the most important legal relations are the domestic relations of parent and child, guardian and ward, master and servant, and husband and wife; the fiduciary relations of attorney and client, physician and patient, spiritual advisers and those advised, and trustee and beneficiary, in addition to the domestic relations; the contract relations of offerer and offeree, promisor and promisee, promisor and third party beneficiary, assignor and assignee, and principal and agent; the property relations of vendor and vendee, lessor and lessee, licensor and licensee, donor and donee, bailor and bailee, and trustee and *cestui qui trust*; and the relations caused by wrong-doers in the case of breaches of obligations, torts, and crimes.

CHAPTER VI

LEGAL REDRESS

IV. Sanctions of State: Exercise and Protection of Legal Capacities. Legal capacities may be exercised and protected: either *A.* thru authorized self-help, or *B.* by legal redress, 1, administered by the courts, 2, thru the established rules of legal procedure.

A. Self-Help. In primitive times persons had no other way of exercising their legal capacities and securing their rights. But the law has regulated and controlled self-help more and more, until today it is narrowly limited. The cases where self-help is available are classed as: 1. self-defense, which is available both for one's self and for those standing in the relation of husband and wife, parent and child, or master and servant; 2. recaption, which is permitted anyone who has been deprived of the possession of his chattels or of the custody of his wife, child, or servant, if accomplished without a breach of the peace; 3. entry upon land by one disseised, if peaceably and without force; 4. abatement of nuisances; 5. distress of cattle damage *feasant*, and in a few jurisdictions still distress for rent.

B. Legal Redress. Today legal capacities are protected almost entirely by means of legal redress.

1. Courts. A court is "a place wherein justice is judicially administered". Again it has been defined as "a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law".

a. With respect to their jurisdiction courts are: (1) of general jurisdiction, and (2) of limited jurisdiction; or (1) of original jurisdiction (where causes are brought in the first instance), and (2) appellate jurisdiction (where causes originate in some other court and are brought to the court in question for review); or (1) exclusive jurisdiction (when cases can be taken before no other court) and (2) concurrent (when the plaintiff has a choice).

In order to determine a cause a court must have jurisdiction (1) of the subject-matter (that is, power to determine the kind of proceeding brought), and (2) of the person against whom, or the thing with respect to which it renders judgment

or makes an order. Jurisdiction of the person is acquired by the service of process, by reading to, or delivering to the person (or by leaving at his residence), a writ in the name of the sovereign commanding his appearance in court. Jurisdiction over property is obtained by the seizure of the property, or by the publication of notice under the provisions of statutes.

b. In the United States there is a dual system of courts, state and federal. Over certain matters and persons each has exclusive jurisdiction; over other matters and persons they have concurrent jurisdiction. In the state system, in addition to police courts and courts of justices of the peace, there are district or circuit courts, of original jurisdiction, and a supreme court, or appellate court, of appellate jurisdiction; and in some states an intermediate court. In the federal system there are a district court, a circuit court of appeals, and a supreme court. The latter has some original jurisdiction in addition to appellate jurisdiction. In England there is only one system. The details of all these systems will be given more fully in connection with the historical development of Anglo-American law which will be considered in Part II.

2. **Legal Procedure.** Legal procedure, or adjective law (because it exists for the sake of substantive law), prescribes the modes whereby remedial rights may be secured. In those exceptional cases where the law still permits self-help it points out the limits within which it may be exercised. In other cases it announces the steps which must be taken to set in motion and carry thru to execution the machinery of the law courts.

Legal procedure includes the rules of pleading, the rules of evidence, and the rules of practice.

a. **Pleading.** Pleadings are the written allegations as to claims and defenses in an action in court. Originally these allegations, or statements, were made orally in open court, but at the present time practically all pleadings are written. Pleadings are supposed to be a scheme for the determination of the issues between the litigants. In Roman law the issues were determined by the *pretors* and then the cases were referred to *judices* for trial. In English law today the issues are frequently determined by a master to whom the case is referred by the court. But in the United States the determina-

tion of the issues is practically left in the hands of the trial attorneys, outside of the courtroom, and they accomplish or fail to accomplish their purpose by serving pleadings on each other. The first pleading of the plaintiff in a code state is usually called a complaint; the first pleading of the defendant, the answer, if he desires to raise an issue of fact; or a demurrer, if he desires to raise an issue of law; and to an answer the plaintiff may make a reply, or a demurrer. At the common law the first pleading of the plaintiff was called a declaration. This could be met by the defendant by a demurrer (general or special), or by a plea (either of the general issue or of common traverse, or of special traverse, or in confession and avoidance). The plea of the defendant could be met by the plaintiff by a demurrer (general or special), or by a replication (by way of traverse or by way of confession and avoidance). This in turn could be met by the defendant by a demurrer (general or special), or by a rejoinder (by way of traverse or by way of confession and avoidance). The rejoinder could be met by the plaintiff by a demurrer (general or special), or by a surrejoinder (by way of traverse or by way of confession and avoidance). The surrejoinder could be met by the defendant by a demurrer (general or special), or by a rebutter (by way of traverse or by way of confession and avoidance). The rebutter could be met by the plaintiff by a demurrer (general or special), or by a surrebutter (by way of traverse). The United States has modified this common law system of pleading by the adoption of code pleading. England has practically abandoned it. Any pleadings by attorneys are there now more nearly according to what would be called notice pleading. The rules of notice pleading proceed on the theory of giving notice of the opposing claims of the respective parties, sufficient to apprise them and the court of the nature thereof. In both issue (common law) pleading and essential fact (code) pleading the rules proceed on the theory of requiring a complete allegation of all the ultimate facts which must be proved at the trial in order to establish such claims. In other words, in both common law and code pleading, the pleadings are concerned not so much with presenting the case to the court for a fair trial as with testing the knowledge of the substantive law which the attorneys of the parties have. This tends to make our legal pro-

cedure a game. A client wins or loses according as his attorney outplays or fails to outplay his opponent, just as the client in wager of battle lost or won according to the prowess or lack of prowess of his champion. Equity pleading is the system which prevailed in England in the High Court of Chancery and which obtains in this country for the conduct of equity cases in the federal courts and in those states where the distinction between common law and equity jurisdictions is still preserved. Its fundamental principles were derived from the Roman law.

b. Evidence. The term "evidence" represents:

Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.
WIGMORE.

Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Evidence is the information given by the respective parties to the tribunal before which the cause is tried upon which to base its decision upon the issues, or disputed matters of fact.
GREENLEAF.

Such information may consist either of the statements of witnesses as to matters of fact which they have observed by means of their senses, or documents produced and read in evidence after they have been proved in accordance with the rules of evidence, or observations made by the tribunal as to the existence and conditions of things submitted to its inspection. Proof is the result of evidence. Evidence is the means of proof. Testimony is the evidence given by living witnesses. Direct evidence is that which tends to prove a fact without the aid of inference. Circumstantial evidence is that which tends to prove a fact as a logical inference from the proof of other facts. Evidence is incompetent when it is not the best evidence, that is, when it shows on its face that there is a higher grade of evidence whose production has not been excused. Evidence is irrelevant when it does not bear on the point in issue. Evidence is immaterial when it would have no effect if introduced.

c. Practice. Practice includes all the other steps in legal procedure not included in pleading and evidence. In primitive

law these were very different from what they are in modern law. In primitive law the mode of trial was never in the form of an investigation of the facts. It was arbitrary and mechanical and generally predicated upon ordeal. Anglo-Saxon methods of trial were compurgation (wager of law), witnesses, charters, record, ordeal (cold water, hot water, hot iron, and the morsel). The Normans introduced into England two new modes of trial; wager of battle (as mechanical as the old Anglo-Saxon methods), and trial by jury, which finally supplanted all other methods and is the present method of trial of most cases. The jury took its origin in the inquisition or inquest of the Frankish kings, who borrowed it from the Roman governors. The Norman dukes brought it into England at the time of the Conquest. At first it was used for all purposes for which the king might desire to know facts within the knowledge of the free men of any locality. The jury then in their verdict stated what they knew not from the evidence of others but from personal knowledge and repute in the neighborhood, but by a gradual process of evolution thru the centuries the jury ceased to be witnesses and became triers or judges of the facts and became subject to rules of law in the awarding of damages.

The following account by Professor Edmund M. Morgan of a hypothetical case involving a student and a policeman will give the student a bird's-eye view of the details of practice and will show him the steps which have to be taken in a civil case in their order and will show the relationship of pleading and evidence to the rest of legal procedure.¹⁶

Beginning the Action. Suppose that Samuel Student and Peter Policeman have been engaged in an altercation. Student asserts that while he was peaceably walking along the street, Policeman without cause struck him with a club and severely injured him. He retains Lewis Lawyer to bring action against Policeman. After making as thorough an investigation as practicable, Lawyer is of the opinion that Policeman was at fault and ought to respond in damages. If this had happened under the old common law system in England, Lawyer's first task would have been to determine what writ and form of action would afford the proper remedy. In this instance Lawyer would have gone or have had Student go to the Chancery Office for a writ in Trespass,

The sheriff would have summoned the defendant Policeman as com-

¹⁶ Morgan, *Introduction to the Study of Law*, 14-18. Published by permission of Professor Morgan.

manded in the writ. On the designated day Policeman, let it be supposed, would have appeared and Student would have been there too. In earlier times these appearances would have been actually made in open court; and the parties by oral pleading would have reached an issue. In later times the appearances would have been made by serving or filing written statements of appearance, and each pleading would have been written and would have been served or filed at prescribed periods of time.

If this controversy occurs in New York today, Lawyer is not at the trouble of going to Chancery. He may start his action without an application to any court or official. He will first make out a summons. . . . He will cause this summons to be served upon the defendant, Policeman, by the sheriff or some indifferent person, who will make the service by handing to and leaving with Policeman a correct copy thereof. The complaint may, but need not, be attached to and served with the summons. If not so attached, the defendant may procure a copy of it by serving on plaintiff's attorney a notice of appearance and a demand for such copy. . . . The sheriff or constable will serve the writ by leaving an attested copy of it with defendant or at his usual abode.

In some jurisdictions the action is begun by filing with the Clerk of the Court the complaint and a Praecipe for a Summons. The Praecipe will usually be entitled with the name of the court and county and with the names of the parties, and will be signed by the plaintiff or his attorney. The body of it will be substantially as follows:

"The clerk of the District Court will please issue summons in the above-entitled action returnable according to law" . . .

The clerk of the court will issue a summons according to the request in the Praecipe, and the proper officer will serve it upon the defendant.

Raising and Deciding an Issue of Law. When Policeman is served with the summons, if he is wise, he will retain an attorney. Let it be assumed that he employs Arthur Andrew. Andrew's first task will be to examine the declaration or complaint. If it has not been served with the summons but [it] is on file in the office of the clerk of the court, he may inspect it there and make a copy of it; if not on file, he may secure a copy from plaintiff's attorney. If after scrutinizing the complaint he is convinced that the facts alleged therein disclose no legal claim against Policeman, he may desire to challenge its sufficiency. He will have to make an appearance for Policeman. In some jurisdictions this is done by filing with the clerk of the court a statement that Peter Policeman appears by his attorney, Arthur Andrew; in others, by delivering to plaintiff's attorney a notice of such appearance or by serving on him a pleading in response to the complaint. In attacking the complaint, at common law and under most codes, he will interpose a demurrer. In New York and a few other jurisdictions he will make a motion for judgment dismissing the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In either event the case will be brought on for argument before the court without

a jury. The court will hear argument upon the question whether, assuming all the facts stated in plaintiff's complaint to be true, defendant has committed any wrong against plaintiff for which the law will give him redress in this action. But it will receive no testimony at all; the decision must be made upon the allegations of the complaint alone. If the court holds plaintiff's pleading insufficient, it will order judgment for defendant unless plaintiff prays and gets leave to amend; if it holds the pleading sufficient, it will order judgment for plaintiff unless defendant prays and gets leave to interpose a plea or answer. Under modern codes it is often provided that the order for judgment must contain such leave. Sometimes, but not often, the court in making its decision will render an opinion which will be printed in the regular law reports. If no amendment is made or plea interposed, judgment will be entered according to the order, unless by the local practice the order is appealable, and an appeal therefrom is perfected.

Raising an Issue of Fact. If Andrew determines that the complaint does require an answer on the facts, he will ascertain from Policeman his version of the occurrence. Let it be assumed that Policeman denies that he struck Student. After making an appearance for Policeman in the manner required by the local rules of practice, he will put in a plea of general issue or an answer of general denial and thus raise an issue of fact for trial by a jury.

Bringing Issue of Fact on for Trial by Jury. It might be supposed that after the issue between Student and Policeman has thus been made by the pleadings, it would automatically come before the court and jury for trial. But not so. In most jurisdictions it might forever lie undetermined in the absence of further action by one of the parties. Courts hold a series of sessions, known as terms, periodically. If Student's case is pending in the New York Supreme Court and he wants it tried, his attorney must, at least fourteen days before the opening of a term of the court, serve upon Policeman's attorney a notice stating that the action will be brought on for trial at that term; he must also at least twelve days before the opening of the term file with the clerk of the court a note of issue, which is merely a request to the clerk to put it on the list of cases which are to be set for trial at that term. . . . In practically all other jurisdictions some such steps must be taken by one of the parties.

The foregoing notices and requests merely get the case in its regular order upon the trial list. It still has to be assigned for trial according to the local practice. In some places, on the first day of the term, the entire list or calendar is called, a determination is made whether any of them are not ready for trial during the term, and the cases for trial by jury are separated from those for trial by the court. After the unready cases are eliminated, the others may be set for trial, each for a day certain, or all in the order in which they appear on the list as revised. In other places there is no call of the list, but at stated intervals a session of the court is held for the purpose of selecting from it cases for trial during a comparatively short period then next ensuing. . . . In still other places, the selection of cases from the list is made by subordinate administrative officials of the court.

Trial of the Issues. Assume that the case of Student against Policeman has been set for trial in Court Room number one immediately after the case of Jones v. Smith. Both Lawyer and Andrew will have to be ready to go on immediately at the conclusion of the Jones-Smith trial. They will be on hand with their respective clients and witnesses. The court will order the clerk to call the next case; and when he has said "Samuel Student against Peter Policeman", and the attorneys have answered that they are ready, the court will direct the clerk to call a jury.

Same—Getting the Jury. A juror must possess certain general and certain special qualifications to be eligible to act in a particular case. For example, he must usually be an elector of the jurisdiction, must not be related within a certain degree of consanguinity to either party and must be in such a state of mind toward the parties and the case as to be able to try the issue fairly and impartially. For alleged lack of any of these qualifications he may be challenged by either party, and if the challenge is found true, he will not be permitted to serve. Such challenges are termed challenges for cause. In addition by statute each party may, without assigning any reason therefor, exclude a specified number of perfectly eligible jurors by peremptory challenge. The procedure with reference to challenge and to ascertaining and disclosing the reasons for challenge is not uniform. Among the various practices are the following: (1) The parties and their attorneys are confronted with the entire number of jurors summoned for service for the term and not then engaged in the trial of other causes. The attorneys, either directly or through the judge, are permitted to ask them as a body questions touching their qualifications to sit as jurors. If any juror discloses a probable ground for disqualification, he may be challenged and further examined; and even extrinsic evidence may be given to prove his ineligibility. If the challenge is found true, he is eliminated; otherwise not. After all ineligibles are thus removed, the clerk by lot selects twelve or twelve plus the number of peremptory challenges allowed, and after the peremptories are exercised or waived, the jury of twelve is sworn. (2) From among the jurors summoned for the term, usually called the panel or the array, the clerk selects by lot to the number of twelve plus the number of peremptories. The attorneys are allowed, directly or through the judge, to examine each of these individually as to his qualifications, and to eliminate by challenge for cause any who show themselves disqualified. If any juror is thus removed, he is replaced by another who is subject to examination as if originally drawn. After the requisite number of qualified jurors is obtained, the attorneys exercise their peremptory challenges, and the remaining twelve are sworn to try the case. (3) In England and Canada the jurors are selected by lot from the panel. As each juror comes to the box either attorney may challenge him for cause or peremptorily. If peremptorily, then no examination is necessary; if for cause, then he may put questions to the juror or present other evidence to support the challenge. But no questioning of a juror prior to challenge is allowed. (4) As each juror is chosen by lot by the clerk, he is examined by the attorneys, in a prescribed order, as to his quali-

fications. The attorney who first examines must exercise his challenge for all reasons before turning him over to the other attorney. If he finds no ground for challenge for cause, and yet desires the juror removed, he must exercise his peremptory challenge at once. When twelve men have been passed by both attorneys, they are sworn to try the issues.

Same—Opening Statements. After the jury is sworn, the plaintiff's attorney makes his opening statement. In *Student against Policeman*, Lawyer will explain to the jurors the exact questions raised by the pleadings which they will have to answer by their verdict, what *Student* asserts to be the facts and how he intends to support these assertions by evidence. In *New York*, he will be followed immediately by *Andrew*, who will outline *Policeman's* case and inform the jurors how he intends to meet and overthrow *Student's* claims. There is no place for argument in the opening. It is made simply to present to the court and jury an outline of the case, so that they may more easily and intelligently follow and apply the testimony. In some jurisdictions *Andrew's* opening will not be made until just before he is ready to offer his evidence.

Same—Evidence. Next Lawyer calls his first witness, who is sworn to tell the truth and nothing but the truth. By means of question and answer he gets from the witness what he knows about the matter in issue. Then *Andrew* has an opportunity to cross-examine; and if he brings out any new matter or makes uncertain anything given in testimony on Lawyer's examination, the latter may re-examine the witness on these points. And in some instances the witness may be subject to several re-examinations by each attorney. The same procedure is followed with each witness offered in *Student's* behalf. *Student* will doubtless be one of them. After presenting all his witnesses on his main case, Lawyer will announce that he rests, that is, that he has no further evidence to offer. Thereupon *Andrew* will proceed with *Policeman's* side of the case. If he has not already done so, he will make his opening statement. Otherwise, he will at once call his witnesses, who will be examined, cross-examined, and re-examined as were *Student's* witnesses; after which he will state that he rests. If the course of the evidence warrants it, Lawyer will have the privilege of presenting evidence in rebuttal, and *Andrew* in surrebuttal.

Same—Motions during Trial. At the close of plaintiff's evidence, the defendant may under modern practice move that plaintiff be nonsuited or that the action be dismissed on the ground that no reasonable jury could find a verdict in favor of plaintiff; and at the close of all the evidence either party may move for a directed verdict on the ground that no reasonable jury could return a verdict except in favor of the movant. In some jurisdictions this latter motion may be made at the close of plaintiff's testimony. If either motion is granted, it of course puts an end to the trial.

Same—Requests to Charge. At the close of the testimony either attorney may present to the judge written requests that he deliver certain instructions to the jury. These requested instructions will declare that the jurors in considering the testimony must apply certain

rules of law in ascertaining the facts and in determining the effect to be given to the facts when found. In some jurisdictions the court is not obliged to give the jury any instructions which are not so requested. The court will advise the attorneys which of the requested instructions it will give in order that they may frame their summing-up arguments accordingly.

Same—Summing-up by Attorneys. These arguments usually come next, though in some states they follow the charge of the court. Ordinarily Lawyer, since Student has the burden of establishing his case, will open the argument, Andrew will answer him, and Lawyer will reply in rebuttal. In some jurisdictions Andrew will open the argument and Lawyer will close, each side having but one speech. In these arguments each attorney will be confined to the evidence and will not be permitted to indulge in prejudicial immaterialities. He will try, by his analysis of the testimony and of the method of applying it to the issues, to persuade the jury that its verdict should be in his favor.

Same—Charge of the Court. The court will then deliver its charge to the jury. This is usually done orally; in some places the court is required to reduce the instructions to writing and let the jury take them to the jury room. In almost all of the states of the Union, this charge must not contain any comment upon the weight of the evidence or the credibility of the witnesses, but must be confined to expounding the rules of law which the jury should apply in reaching their verdict. In the Federal Courts, in Connecticut and a few other states, the court may express its opinion upon the weight of the evidence and the credibility of the witnesses. In England the charge is called the summing-up by the court and consists of a review and analysis of the testimony and the opinion of the court on how it should be handled, as well as a statement of the rules of law governing the case which are to be applied by the jury.

Same—Verdict. At the conclusion of the charge the court places the jury in the custody of an officer, who conducts them to the jury room. In this room they deliberate upon the case in secret until they reach a verdict. In some places they deliver the verdict orally in court through their foreman; in others they return a written verdict signed by the foreman, and express oral assent thereto when it is read in open court. After the verdict is received by the court, the jury is discharged and the trial is at an end.

Motion in Arrest of Judgment. After the verdict, which may be assumed to be in Student's favor, the defendant may move that judgment be arrested on the ground that the declaration or complaint is fatally defective in wholly failing to state a cause of action. The question raised by this motion is the same as that raised by a general demurrer; but the court's attitude at this stage of the proceeding is to resolve every doubt in favor of the pleading, because it is now supported by the verdict. In determining this motion, the court may render an opinion which will find its way into the law reports.

Motion for Judgment notwithstanding the Verdict. If the verdict had been in favor of Policeman, Student might have moved for judgment notwithstanding the verdict, had Policeman's sole defense been one

in confession and avoidance, on the ground that the facts set up in the plea or answer were totally insufficient to constitute a justification, excuse or discharge. Here too the question would be essentially the same as on a general demurrer to the plea, except that the court would indulge every reasonable presumption to support the pleading. In this case too the court might render an opinion which would be reported.

Under the codes, a provision is frequently found authorizing the court after verdict to order judgment notwithstanding the verdict if upon the evidence it ought to have directed the jury to return a verdict in favor of the party against whom it was in fact returned.

Motion for New Trial. Under modern practice the defeated party may usually make a motion for a new trial either before or after judgment has been entered upon the verdict. This motion is usually made on the ground that the trial court over the objection and exception of the movant made erroneous rulings during the trial, for example, in receiving inadmissible evidence, or in giving the jury an improper instruction.

Judgment. If the motions made after the rendition of the verdict are denied, Student will cause judgment to be entered upon the verdict. The verdict, of course, is merely a finding of the jury. In *Student against Policeman*, it will read: "We, the jury, find a verdict in favor of plaintiff and assess his damages at \$5,000." The judgment is an order of the court that a party do have certain relief; it will read in part: "It is ordered and adjudged that plaintiff, Samuel Student, have and recover of defendant, Peter Policeman, the sum of \$5,000 together with the sum of \$75.90 costs and disbursements as taxed, amounting in all to \$5,075.90."

Review by Appellate Court. When an issue of law has been finally determined by a trial court upon demurrer, or an issue of fact has been decided after trial by jury or by the court without a jury, the defeated party may usually have the proceedings of the trial court reviewed by a higher tribunal. A record of the proceedings must be made up and transmitted to the reviewing court according to the rules of local practice. Everywhere this record must contain a correct statement of so much of what occurred at the trial as to show the alleged mistakes of the trial court, the defeated party's objections and exceptions to them, and their bearing upon the issues which were tried, and it must be certified as correct by the trial court. The orthodox method of securing a review in a common law action is by writ of error; in equity by an appeal. Under modern codes the usual method is by a statutory appeal. In *Student against Policeman*, the latter's remedy will be by writ of error or statutory appeal. His attorney will generally be required to take the following steps, though the order of procedure may vary in different jurisdictions: (1) Notify the court, usually through its clerk, and opposing counsel of his appeal to the higher tribunal. (2) Have made up a record—a bill of exceptions or settled case—which he proposes as an adequate and proper statement of so much of the proceedings before the trial court as will be pertinent to the matters to be reviewed; this will be submitted to Lawyer, who will have opportunity

to suggest corrections and additions; and after a hearing, if necessary, the trial court will certify the record as originally made up or with such changes as it deems necessary. (3) See to it that this record and the required original papers are transmitted to the higher court. (4) Prepare a brief, which specifies the errors upon which he relies for reversal and the reasons and authorities supporting his contentions; and furnish the required number of copies of it to the court and to Lawyer. (5) In some jurisdictions see to it that the case is properly put upon the calendar of the higher court for argument, and notify Lawyer of it. Lawyer will prepare a brief in opposition and furnish copies of it to Andrew and to the court. At the appointed time Andrew and Lawyer will appear before the higher court and present their oral arguments. The court will take the case under advisement and later render its decision. A record will be made of all the proceedings in the higher court, and a portion of that record including the court's opinion will usually be printed in the official reports of the court.

In order to help the student still further to understand the orderly steps of legal procedure they are set forth below in table form.

Legal procedure comprises the rules

1. For selecting the proper jurisdiction;
2. For ascertaining the proper court;
3. For setting in motion the machinery of the court (procedure proper)
 - a. Criminal
 - (1) Sworn complaint, indictment (or information)
 - (2) Warrant
 - (3) Arrest (this may be without warrant sometimes)
 - (4) Preliminary examination (where no indictment) and binding over to the grand jury
 - (5) Bail
 - (6) Arraignment
 - (7) Plea, or demurrer
 - (8) Trial
 - (a) Empanelling the jury
 - (b) Swearing the jury
 - (c) Opening statement of state's attorney
 - (d) Introduction of evidence by state
 - Direct examination
 - Cross-examination
 - State rests
 - (e) Opening statement of defendant's attorney
 - (f) Introduction of evidence by defense
 - Direct examination
 - Cross-examination
 - Defendant rests
 - (g) Requests for instructions

- (h) Arguments of counsel
 - Prosecuting attorney
 - Defense attorney
 - Prosecuting attorney
 - (i) Instructions of the court
 - (j) Verdict
 - (k) New trial. Appeal
 - (l) Judgment
 - (m) Sentence.
- b. Civil (common law and code)
- (1) Procuring writ, or issuance of summons
 - (2) Filing complaint, or serving complaint (in some states this step comes first)
 - (3) Service of summons and complaint
 - (4) Other pleadings, like answer and reply
 - (5) Notice to clerk
 - (6) Calling cases
 - (7) Setting cases
 - (8) Trial
 - (a) Appearance
 - (b) Empanelling and swearing of jury
 - (c) Statement of plaintiff's attorney
 - (d) Introduction of evidence by plaintiff
 - Direct examination
 - Cross-examination
 - Plaintiff rests
 - (e) Statement of defendant's attorney
 - (f) Introduction of evidence by defendant
 - Direct examination
 - Cross-examination
 - Defendant rests
 - (g) Evidence by plaintiff to meet new matter, etc.
 - (h) Requests for instructions (1 Ptf. 2. Def.)
 - (i) Argument of attorneys (1. Ptf. 2. Def. 3. Ptf.)
 - (j) Instructions of court
 - (k) Verdict
 - (l) Motions, new trial, appeal
 - (m) Judgment
 - (n) Appeal
 - (o) Judgment
4. For setting in motion the physical force by which judgment of the court is rendered effectual—execution.

Legal procedure, as it exists under the codes of the United States, has been set forth above somewhat in detail, not because it is perfect or necessary to a legal scheme of social control, or because the writer desires to have it continue, but because it is the system of the United States. All of these rules of legal procedure could be changed or abrogated for new

rules, and the only effect would be to require the members of the legal profession to learn the changes or new rules. The rules are crude, primitive, and poorly adapted for the end which they have in view. In contrast with them are the modern English rules of legal procedure. The procedural field divides itself into the preparation of cases for trial, the trial itself, and proceedings for review. So far as the preparation of cases for trial is concerned in England today the summary judgment for collection of debts, the declarations of rights for the construction of deeds, wills, contracts, etc., and the discovery before a master on a summons for directions have resulted in the substitution of a judicial tribunal for the private legal tournament of attorneys, with their efforts for surprise and their maneuvering for advantage. As a consequence the subject of pleading is not exalted in England as it is here. In the actual trial of cases the substitution of a nonpartisan control by judges for the partisan control of trial attorneys is even more noticeable. The state impanels the jury, and the judge determines the issues, sums up the case before the jury, and requires special verdicts. Hence there is no bickering over rules of evidence. Appeals are conducted as rehearings, and the appellate court practically always renders final judgment. As a consequence new trials and reversals for technicalities in procedure are practically unknown, and the rules of practice are very simple. The great characteristic of United States legal procedure is attorney control of the proceedings. The results are delay, uncertainty, expense, technicality, and injustice. All of these results are admitted both by the public in general and by the leaders of the legal profession.¹⁷ In the United States we are not so much adjudicating cases as litigating legal procedure. Legal procedure has become an end and is no longer a means. The great characteristic of English legal procedure is judicial control of legal proceedings. The result is that the English have developed a legal procedure which makes the sanction of the state a real protection of legal capacities and law a real scheme of social control.¹⁸ Perhaps it is not too much to hope that

¹⁷ American Bar Association Report, Vol. X, p. 317ff.; 12 *Ill. L. Rev.* 540;

¹⁸ A recent brief but adequate account ("Appraisal") of the modern English system of English legal procedure by Edson R. Sunderland is published in 11 *Am. Bar Assn. Jour.* 773, and 9 *Jour. Am. Jud. Soc.* 164. See also Chief Justice Taft's report on the English system, 6 *Jour. Am. Jud. Soc.* 42-45, and 8 *Am. Bar. Assn. Jour.* 601; Dodge, "Employment of Masters", 9 *Jour. Am. Jud. Soc.* 177; Higgins' report on English

some day legal procedure in the United States will be reformed so as to make it a real instrument for the administration of justice, and not what it is today—the rules for a game to be played by trial attorneys.

Other forms of civil procedure are equity procedure, probate procedure, and commission procedure. Each one of these forms of procedure differs from the other, and all differ from common law and code procedure. No extended explanation of these different forms of procedure will be undertaken. In equity procedure the system of pleading is different from common law or code and there are many other peculiarities. The difference between equity procedure and common law procedure is greater than that between equity procedure and code procedure. Many of the characteristics of equity procedure have been incorporated into code procedure. In probate procedure there is ordinarily no pleading but in lieu thereof a petition. The practice also differs materially from other forms of practice, and for the most part consists of a succession of petitions, motions, orders, and decrees, with the consequent hearings and introduction of evidence. Commission procedure in the United States is also very different from the other forms of procedure which exist in the United States. In general it may be said to resemble the modern English common law procedure more than any other form of procedure, both as to the matter of pleading and as to the control of the members of the commission over the conduct of the trials. One reason for the difference between common law and code procedure and the other forms of legal procedure in the United States is the absence of jury trials in the latter. Anyone practicing law before an equity court, or a probate court, or before a commission especially, should remember that a different system of legal procedure obtains in them from that with which he may be familiar in other courts. Still another form of procedure, arbitration procedure, is growing up in this country. It has not yet taken its final form, but it gives evidence of a tendency to become much like commission procedure.

courts and procedure, 7 *Jour. Am. Jud. Soc.* No. 6; Kale, "The English Judicature Acts", 4 *Jour. Am. Jud. Soc.* No. 5; Rosenbaum, *The Rule-Making Power in the English Supreme Court*; and Sunderland, "English Struggle for Procedural Reform", 39 *Harv. L. Rev.* 725.

CHAPTER VII

SOURCES AND FORMS OF LAW

THE sources, or formulating agencies, by which legal rules, principles, and standards have been formulated have been classed by Roscoe Pound as: *A* usage, *B* religion, *C* adjudication, *D* scientific discussion, *E* the general moral sense of the community, and *F* legislation; and the forms of the law as: *A* legislation, *B* judicial decisions, and *C* books of authority.

A. Legislation. There are three forms of legislation in the United States: constitutions, federal treaties, and federal and state statutes.

B. Judicial decisions are embodied in the common law, equity, canon law, and the law merchant.

1. Common Law. The common law is that body of law developed by the common law courts of England, of which throughout most of English legal history the courts of original jurisdiction were the King's Bench, the Common Pleas, and the Exchequer, and the courts of appellate jurisdiction were the King's Bench, Exchequer Chamber, and House of Lords. These courts made the common law a well-defined strong system of law, strong enough to withstand the Roman law, by regarding their past decisions not merely as decisions of the particular causes before the court but as solemn ascertainedments of the law as well. In the United States until the middle of the eighteenth century, justice was administered mostly by executive officers and legislative assemblies with little or no other law than common sense, the light of nature, and Hebrew law; and for some time after the Revolution there was antipathy towards English law, but economic development and the study of Blackstone finally led to its establishment as the law of America. The common law of the United States now consists of the decisions of the old English courts (generally prior to the Revolution)¹⁹ so far as applicable to conditions here, American judicial decisions since the Revolution, judicial decisions in England and other common law countries since the Revolution, the law merchant, the canon

¹⁹ Indiana, prior to 1607.

law so far as it was received into the English Ecclesiastical Courts in probate and divorce causes, international law so far as made a part of our municipal law, and English statutes prior to the Revolution so far as applicable to conditions in America.

2. Equity. Equity is that body of law developed by the Courts of Equity (or Chancery) in England and the United States. The Court of Chancery developed in England, out of the residuary power of the king to do justice which had been delegated to the common law courts, for the purpose of correcting the formal character of the rules of the common law as to property in land, the rigidity of its system of writs and actions, the defect that it could not command, the defect that it must have one party on each side and only two sides, the defect that its jurisdiction was contentious and not preventive, and the defect that it had no power to make a conditional judgment. The chancellors did not confine themselves to any special field, but corrected abuses both in substantive law and procedure wherever they found them. They found the greatest abuse in the substantive law of remedies and corrected this. Hence they made equity essentially a law of remedies. Their principal contributions to substantive law are the doctrines of trusts and equitable servitudes in property, specific performance, reformation, rescission, accounting and assignment in contracts, equitable waste and prevention of torts in torts, redemption in mortgages, and constructive trusts in quasi-contracts; and their principal contributions to legal procedure are rules as to joinder of parties and actions, depositions, proceedings *in personam*, subpoena of witnesses, interpleader, discovery, enforcement of decrees, contempt, and methods of taking an account, etc.

3. Law Merchant. The law merchant is that body of law developed by the merchants in their own local courts. The merchants of western Europe at one time had a body of commercial usage of their own. The ordinary law was not applied between merchant and merchant. They were in a class by themselves, and were governed by the law applied by their own special tribunals. But largely thru the influence of Lord Mansfield the common law courts gradually supplanted these merchants' courts by summoning juries of merchants to in-

form them of the customs of the merchants and converting the custom of merchants into a custom of decision in mercantile causes, and after once determined a precedent to be followed as much as any other judicial precedent. The chief contributions of the law merchant to our law are the law of negotiable instruments and the law of insurance. But in modern times merchants have contributed a number of principles to the law of bills of lading and warehouse receipts, thru usage and scientific discussion.

4. Canon Law. The canon law is that body of law administered by the church in the Middle Ages. It was largely derived from the Roman law. It was to a considerable extent incorporated into the law of equity both in the matter of substantive law and legal procedure, because of the fact that most of the early chancellors were ecclesiastics. It also contributed most of our law of probate and divorce, since the Ecclesiastical Courts in England retained this jurisdiction until most of its principles were settled. The mode of proof—examination of adversary under oath and examination of witnesses before trial—which canon law contributed to equity, was not derived from Roman law but developed by itself.

C. Books of Authority. In Anglo-American law, contrary to the fact in other systems of law, there are few books of authority. Littleton's treatise on tenures and Coke's statement of the common law of the classical period in which he lived, which is found in his *Commentaries on Littleton*, are authorities upon the subjects on which they treat as to the law of those times. The books of Glanvil, Fleta, Bracton, and Sir Mathew Hale are also sometimes spoken of as authority, and Blackstone's *Commentaries* and Kent's *Commentaries*.

PART TWO

HISTORICAL DEVELOPMENT OF ANGLO-
AMERICAN LAW

CHAPTER VIII

INTRODUCTION

IN approaching the study of Anglo-American law from the historical standpoint,²⁰ one discovers first a period of no law. In this period every man, or at least the head of the family, was a law unto himself. Undoubtedly in this period there were certain forms of conduct which were generally regarded as wrongful, but there was no means of redress therefor other than vengeance and self-help, and unregulated vengeance and self-help were liable to cause as many wrongs as they prevented. The result was a state of society where private warfare was the usual order. Under such conditions human progress was practically impossible, and the immediate predicament of the race was unendurable. To the credit of the race it may be said that it has evolved one plan after another to improve its condition, until the present social order has been reached, and it probably will continue to plan for its improvement until new and better social orders appear.

In English history the boundaries of this period of no law are unknown. It began at least back as far as Neolithic men (Iberians) and Palaeolithic men (Eskimos) and it probably continued down thru the times of the Celts and Britons, Gauls and Belgians (Goidels), and perhaps thru the times of the Jutes, Saxons, and Angles (who together became the English), 449-584. But whatever were the boundaries of the period of no law and whatever other legal development may have occurred in England, the period of the Roman occupancy (55 B.C. to 410 A.D.) will have to be counted out. During a part of the time of the Roman occupancy of Britain, if not thru most of it, the Roman law was applied. This was not

²⁰ Pound, "The End of Law as Developed in Legal Rules and Doctrines, and in Juristic Thought", 27 *Harv. L. Rev.* 195, 605, and 30 *Harv. L. Rev.* 201; *Select Essays in Anglo-American Legal History*; Pollock and Maitland, *History of English Law*; Maitland and Montague, *Sketch of English Legal History*; Dean, *The Student's Legal History*; Jenks, *Short History of English Law*; Holdsworth, *History of English Law*; Walsh, *History of English and American Law*; Ames, *Lectures on Legal History*; Holmes, *The Common Law*; Plucknett, *Statutes and their Interpretation in the Fourteenth Century*; Langdell, *Equity Pleading*; Spence, *Equitable Jurisdiction*; Digby, *History of the Law of Real Property*; Leake, *Law of Property in Land*; Thayer, *Preliminary Treatise on Evidence*; Street, *Foundations of Legal Liability*; Taylor, *Origin and Growth of the English Constitution*; Stubbs, *Select Charters Illustrative of English Constitutional History*.

the Roman law as codified under Justinian. Yet it was a developed system of law. Hence if Britain had retained the Roman law it would have retained a system of law which would not have needed much further development, as measured by modern standards, and there would be very little material for historical inquiry. But when the Roman legions withdrew, apparently Roman law soon followed, and the task of climbing out of a stage of no law had to be taken up anew.

Of course Anglo-American law has been greatly influenced by Roman law and has borrowed many of its principles. Because of this fact, some maintain that there was no break after the Roman occupancy, but the better opinion today seems to be that whatever part of our law is of Roman origin came from the Roman law, not as it was planted in Britain during the Roman occupancy, but as it was again brought by Augustine's mission in 597 and by later ecclesiastics and chancellors and justices like Holt and Mansfield.

Anglo-American legal history, since the Roman occupancy and the period of no law, may be divided into five periods. To these Dean Roscoe Pound has given the following names: I. Archaic Period; II. Strict Period; III. Period of Equity; IV. Period of Maturity; V. Period of Socialization. These periods do not follow each other as buildings built side by side, but more as darkness turns to daylight. One period does not begin at a certain date and end at another date when another period begins; but one period shades into another and overlaps another. Some of the characteristics of the first period still survive in modern times in the form of self-help still permitted individuals. Characteristics of later periods are found in earlier periods. Hence, when Anglo-American legal history is divided into five periods and these are given boundaries, all that is meant is that there comes a time when certain characteristics seem to predominate over others, and periods have been named according to their predominating characteristics, and periods have been said to begin and end when certain characteristics begin and cease to predominate.

The following table shows the English kings since the Conquest, with their regnal years, the reigning houses or families, and the five periods named above:

Anglo-Saxons	410-1066 . . .	Anglo-Saxons	Archaic Period
William I	October 14, 1066	Normans	
William II	September 26, 1087		
Henry I	August 5, 1100		
Stephen	December 26, 1135		
Henry II	December 19, 1154		
Richard I	September 23, 1189	Plantagenets	
John	May 27, 1199		
Henry III	October 28, 1216		
Edward I	November 20, 1272		
Edward II	July 8, 1307		
Edward III	January 25, 1326	Lancaster and York	
Richard II	June 22, 1377		
Henry IV	September 30, 1399		
Henry V	March 21, 1413		
Henry VI (red rose)	September 1, 1422		
Edward IV (white rose)	March 4, 1461		
Edward V	April 9, 1483		
Richard III	June 26, 1483		
Henry VII	August 22, 1485		Tudors
Henry VIII	April 22, 1529		
Edward VI	January 28, 1547		
Mary	July 6, 1553		
Elizabeth	November 17, 1558		
James I	March 24, 1603	Stuarts	
Charles I	March 27, 1625		
Commonwealth	January 30, 1649		
Charles II	May 29, 1660		
James II	February 6, 1685		
William and Mary	February 13, 1689	Hanovers	
Anne	March 8, 1702		
George I	August 1, 1714		
George II	June 11, 1727		
George III	October 25, 1760		
George IV	January 29, 1820	Hanovers	
William IV	June 26, 1830		
Victoria	June 20, 1837		
Edward VII	January 22, 1901		
George V	May 6, 1910		

CHAPTER IX

ARCHAIC PERIOD (ANGLO-SAXONS)

THE first, or Archaic Period, accordingly, may be said to have begun shortly after the end of the Roman occupancy (410 A.D.) and to have extended down to the time of Edward I (1272 A.D.), altho during all this time it was changing and becoming like the Strict Period, with which it was followed, and it became so nearly like the Strict Period in the time of Henry II that some perhaps might choose the time of Henry II for the ending of the Archaic Period instead of that of Edward I.

Characteristics. The end, or purpose, of the law in the Archaic Period was the preservation of the peace. Society wanted to put a stop to the intolerable situation of warfare which existed where men were primitive and there was no law. As we look back upon the work of society in this period we wonder why it did not at once outlaw private warfare and substitute for vengeance and self-help a law enforced by the state. But we must remember how people looked upon vengeance and self-help then. They had always been resorting to them. They would refuse to give them up. They wanted a new order, or at least the best of them did, but at the same time they wanted the old order, or at least the worst of them did. Perhaps it will help to understand the situation in Archaic times to think of the present situation so far as war between the nations is concerned. We ought to outlaw public war and substitute law for force in international relations. But how do people take to the suggestion? The first effort here as in Archaic times seems to have to be not to destroy vengeance and self-help but to regulate them. The history of the Archaic Period, consequently, is a history of the regulation of vengeance and self-help.

Anglo-Saxons. This regulation, at first, was very modest. It consisted for the most part of efforts to prevent the avenger from making good his loss at the expense of his innocent neighbors. This was accomplished by the requirement as a matter of custom that the avenger attempt to identify the wrongdoer, that he follow the trail of the thief (fresh pursuit; hue and cry), that he resort to distress; and that he

restrain his vengeance to the murderer or other wrongdoer and his kin. Then the right of sanctuary came to be respected.²¹ About 600 A.D. wise men set down ninety dooms, or tariffs, or sums to be paid for deeds of violence in lieu of vengeance. These were known as the dooms of Aethelbert, king of Kent (584-616)²². Ine of Wessex (688-726) published another set of tariffs. Offa of Mercia (757-796) published still another set. Alfred (871-900) continued the work of the others and made new rules for the preservation of the peace. Canute, the Dane, (1017-1035) brought to a close the period of Anglo-Saxon law. Edward the Confessor (1042-1051) was famed in later history as a lawgiver, but Maitland says he never made a law but simply was credited with the law of his predecessors. The next step after the development of the blood fine, or wergild, was the right of proof of innocence. This proof consisted (1) of the pronouncement of the doom by the elders, (2) privilege of the proof, (*a*) by oath-helpers if the accused was of good character, and (3) if the accused failed to clear himself, payment of the wergild. However, there was no way of compelling this. The accused had this privilege. If he paid, that ended the matter. If he refused to pay, or was too poor to pay, then the feud was revived. This was as far as legal development went in Anglo-Saxon times.

Land Ownership. When the Angles, Saxons, and Jutes migrated to Britain they for the most part migrated as tribes. In the larger expeditions all the people, high and low, free and servile, from a considerable territory, moved together from their old location to the new they were seeking. Hence it would be expected that, after their conquests of the Britons, they would establish in their new environment the same legal system which they had had in Germany. This is found to be the case. The territory captured²³ was probably allotted by the leaders of a tribe or state according to a plan creating communities and districts corresponding with those with which they had been familiar. To each hundred warriors, with their families and all others who had occupied a similar district with them in Germany, was allotted definite territory with

²¹ Cf. the regulation of vengeance in Hebrew law, 21 *Exod.* 13; 1 *I Kings* 50; 2 *I Kings* 28; 19 *Gen.* 4; 19 *Judg.* 22; 21 *Exod.* 13; 20 *Josh.* 1-9.

²² Maitland and Montague, *Sketch of English Legal History*, Appendix I. Cf. Code of Hammurabi.

natural boundaries. This larger district was divided among chiefs and village communities. Village communities were made up of families bound together by blood, marriage, and ties of neighborhood, who established village communities with their dwellings, outbuildings, enclosures, and common-field system of husbandry, consisting of meadow fields assigned to freeholders and outlying pastures and woodlands used in common. The land assigned to the village communities was in turn assigned to each freeholder in amounts of about 120 acres each (one hide), and was held, the house and its immediate plot in absolute ownership and the rest subject to the common-field method of agriculture. To the chiefs, or magistrates, must have been assigned large independent tracts entirely independent of the tracts given to village communities. In addition to the land thus allotted was a large amount of unappropriated land, which belonged to the tribe or nation, and which later came to be regarded as land of the king. This latter land was granted out to the churches and great men from time to time, and was known as bocland, to distinguish it from the rest of the land which was known as folkland. Freeholders of folkland had the power of alienation and their heirs could not be disinherited. Some sort of dower and curtesy also attached to folkland. Bookland also usually provided that the holder could convey and devise by will. A considerable class of tenants came to settle on different parts of the land in the country still unappropriated, without absolute title either by allotment or book, but by paying rent to the state. They had not more than life estates, and could not convey or will, but undoubtedly otherwise held their land as folkland. The churches and other holders of bookland granted land for temporary use, during the latter part of the Anglo-Saxon period, and this was called laenland. The tenant had the usufructuary enjoyment of the land rather than ownership. Thruout Anglo-Saxon history the large estates kept growing in number and size. This was due both to the new grants by the king and to the fact that the small estates of the poorer freeman were constantly being merged in the great estates of the territorial lords. By the close of the Anglo-Saxon period the greater part of the country was held in this way. A district then assumed a form closely resembling the manor of feudal times. The relation of lord and man developed until

the entire social order was included therein. Waste or public land of the state was the king's land and waste land in a district was regarded by the territorial lord as his individual property. Old community rights of pasturage and the like came to be regarded as incorporeal rights in the land of the lord. In other words, in practical effect tho not in name, there was established by the Anglo-Saxons a feudal system. Conditions were ripe for the introduction of the feudal system in law as well as in practical effect.

Status. The social life of the people in Anglo-Saxon times was characterized by a new status system which took the place of an older disappearing patriarchal system. The social ranks consisted of the king and thegns appointed by him; the earls, or noblemen, and the thegns appointed by them; the ceorls, or freemen; and the theows (serfs), or non-free men—more slaves than villeins of later history. The ceorl was the typical farmer.

Substantive Law. The ideas of law and legal procedure possessed by the Anglo-Saxons were very crude. The only social interest which they tried to protect was that in peace. They tried to abolish the private warfare which was the result of vengeance and self-help. They did this as all human beings have done, by a scheme of social control recognizing legal capacities in individuals and providing means of legal redress. But the only antecedent rights and duties which they recognized were those of personal safety, family, and property, with the merest beginning of contracts, and all of these were bound and limited by the principles of the status system and the system of land ownership. Serfs were given no rights. Individuals in other classes had not emerged so as to be given all the same rights. The only obligations, or contracts, recognized were the pledge (wed) and the bail, or guarantee (borh). The property right included cattle (chattels), and land, bocland evidenced by charters, held by churches and thegns, and folkland held by freemen. Land was conveyed by deeds of conveyance and by livery of seisin. The only public right recognized was that of the king's peace, at first confined to the king's house, but gradually extended to the highways, his ministers and servants, and finally to the whole realm. Wrongs were not divided into torts, crimes, and breaches of contract, but they were just wrongs. There was

no distinction between torts, crimes, and breaches of contracts. Wrongs had a tort aspect in that wrongs were generally regarded as private, with definite compositions provided therefor by the dooms, but otherwise they could not be called torts. There was no criminal law, altho treason (as a violation of the king's peace) dates from the time of Alfred, and between the time of Canute and the Conquest there was development in the direction of a true criminal law in connection with revenue, the police, and the substitution of the king's vengeance for that of the community. But even then there were no prisons and no criminal procedure.

Remedies. The remedies (remedial rights) for legal wrongs under the Anglo-Saxon system were essentially fines (wergild) provided by way of composition. If the fine was payable to the king for a breach of his peace it was called a wite. If the fine was payable to the injured party it was called a bot. By Alfred's law of treason, however, it was provided that such offense should be botleas (bootless), that is, incapable of being compounded by money payment. This assessment of wrongs at a price in money is a peculiarity of early law. It is found not only in the complicated tariffs, or dooms, of the Anglo-Saxons, but also in the Code of Hammurabi and Hebrew law.²³ Everything had its price, from a chattel to human life. This scheme of compositions succeeded the blood-feud, and was in turn succeeded to some extent by outlawry, in case of persistent refusal to appear in court, and by the death penalty in case of treason and secret murder.

Courts. Government among the Anglo-Saxons also was modeled after that with which they had been accustomed in Germany. There was some sort of local assembly of the free-men of the village which regulated purely local affairs, so far as they were regulated, and elected representatives of the villages in the court of the hundred. The headman of the hundred, reeve, was the presiding officer of the court. The hundred court was also attended by the parish priest, four additional chosen representatives from each township, and by the lords of separate estates within the district, or by their stewards. Instead of the German national assembly there were in England above the hundred the king and the witanagemot. With the union of the many small states into seven larger kingdoms,

²³ 21 and 22 *Exod.*

the assembly of the smaller states became the folkmoot of the shire, the county court of later times. With the union of the seven kingdoms into a single nation, there was a further extension of the same process. The shire contained a number of hundreds. The chief man of the shire was the ealdorman, who was a military leader, sat as a member of the shire court, as a national officer received one-third of the profits of the court, and was chosen by the king and witan until the office became hereditary. The sheriff, a representative of the king appointed by him, was the presiding officer of the shire court. The shiremoot was held twice a year. Besides the ealdorman and sheriff, its members were the bishop, the lords of private estates, the reeve and four men from each township, and all public officers. The witanagemot was not composed of elected representatives but of the ealdormen of the shires, the bishops of the dioceses, and the king's thegns, or ministers. The witanagemot was never large, but increased in size with the development of royal power. A complainant could not apply for relief to the shire court until he had thrice been denied relief by his hundred court. The king could not be appealed to until after both the hundred and the shire courts had failed to do justice. Besides the courts above mentioned there were the sheriff's tourn, which met once a month, tun-moots, and courts of a private nature held by thegns upon their own land (from which latter courts there was probably an appeal to the shire court, or to the king).

Legal Procedure. The Anglo-Saxon modes of trial were compurgation and the ordeal.

Compurgation. If anyone was sued in a civil action or accused of a crime, he could bring eleven men of the hundred to swear on his behalf that they believed his account of the case. In the case of legal transactions, the witnesses or some of them probably formed the compurgators. In the cases of torts and crimes the witnesses would be the compurgators if there were any such. Otherwise the compurgators were much like witnesses to character. If the defendant was not outsworn by the compurgators of the plaintiff or complainant, he of course won his case.

Ordeal. Ordeal consisted in an appeal to the supernatural. The person accused first swore to his innocence, and then he had to undergo one of three tests: the ordeal by water, the

ordeal by fire, or the "accursed morsel". In the ordeal by fire one had either to grasp a red-hot iron, or to walk bare-foot over burning ploughshares. The scarred and blistered members were then bound up by a priest with consecrated ointment. If the scars were healed at the end of three days the sufferer was innocent. If not, he was guilty. The ordeal by water was of two forms: hot water and cold water. In the case of hot water the accused plunged his arm into boiling water, and thereafter was treated as in the case of the ordeal by fire. In the case of cold water, the accused was tied hand and foot and was thrown into a pond or river. If he floated he was guilty; if not, he was innocent. In the case of the accursed morsel, the accused, after calling upon the Deity to make the bread stick in his throat if he was guilty, proceeded to eat the morsel slowly. If he swallowed it freely he was innocent; but if he choked in any way he was guilty.

The above scheme for the regulation of vengeance was an effort to preserve the peace by giving to the accused a few capacities to influence the conduct of the avenger, and by giving him the right to a formal dramatized procedure, like compurgation and ordeal, administered by the thegns, or wise men, who applied the tariffs and the law they could remember (custom and Roman law), in the hundreds and county courts. But, with the possible exception of a little criminal law, it went no farther than voluntary acquiescence on the part of the convicted accused, and if this failed society went back to vengeance and self-help. There was no execution of the decision. Yet thruout Anglo-Saxon history there was a growth in law, even if it was only a growth in the regulation of vengeance. As we have seen, it developed some substantive law and a great deal of legal procedure. Just as the law of wrongs was not classified, so the law of procedure was not. There was procedure, but procedure was not divided into pleading, evidence, and practice. There were no rules of pleading in the sense in which that term is understood, and there were no rules of evidence, yet the summoning of the attesting witnesses, the quantitative effect of the oath, the conclusiveness of seal, and the production of the original document gave certain evidential effects. Such was the Anglo-Saxon customary law, but this it was which was destined in time to be made over into the common law of England and the United States.

CHAPTER X

ARCHAIC PERIOD (NORMANS AND FIRST PLANTAGENETS)

Normans. The Norman kings continued the work begun under the Anglo-Saxon kings, and Henry II, the first of the Plantagenets, did more than regulate vengeance and self-help; he almost supplanted them by the machinery of the state.

William the Conqueror continued the Anglo-Saxon law, both for his own sake and for the sake of his subjects. He applied the murder fine to his own uses, and he developed the idea of the king's peace. He also introduced some new features. He introduced in place of the witanagemot the Curia Regis, composed of the officers of state, barons, and justices; and the feudal system, altho he also kept the old English militia of foot soldiers in addition to the feudal system. He restored national unity, and just before his death broke the neck of the feudal system (so far as the political power of the lords was concerned) by requiring every landowner to take an oath to be faithful to him first. The barons triumphed over Stephen. But Henry II again conquered the barons by substituting scutage for military service.

The Normans had high administrative skill. Their ability was high, and there was little corruption among them. They had no written code. They applied the Anglo-Saxon common law (dooms, etc.) as developed by a French-speaking court and some Roman law maxims, principles, logic, method, and spirit, and allowed the canon law to be introduced thru the Roman Catholic church in probate, divorce, and admiralty matters. Their legal language was Latin, and this continued to be the legal language in records of litigation until 1731, when English was substituted; and in published laws and law books until the thirteenth century, when French was substituted. In the sixteenth century, English supplanted French in laws and law books. The Normans introduced the feudal system, but their real contribution to English legal history was the idea that justice should be administered by the king's justices. This kept English law from going back to Anglo-Saxon law, on the one hand, and from becoming Roman law, on the other hand.

First Plantagenets. The first of the Plantagenets, especially Henry II, completed the work carried on by the Normans. They did so much, in fact, that it is difficult to decide whether their work marks the end of the Archaic Period or the beginning of the Strict Period. Roscoe Pound says that English law owes more to Henry II than to any other ruler. Henry II attempted to concentrate the whole system of English justice in a court of professional judges, the Curia Regis, from which in his day there was separated the Court of Exchequer presided over by barons. He tried to get control of the church courts by the Constitutions of Clarendon (1164), but failed in this effort thru his quarrel with his chancellor, Thomas à Becket, and final murder of him. This reform was brought to pass in the fifteenth century. The nation was offered royal justice in place of the Anglo-Saxon local courts of the county and hundred and of the domestic Court Baron which had come in with the feudal system, and the king's justices appeared as Justices in Eyre. The other courts were not abolished. So long as litigants would continue to go to them they continued to function, but by the reign of Henry III the kings' courts, which then consisted of Exchequer, Common Pleas, and King's Bench, had practically supplanted the local courts. It is because they did not supplant the local courts before this time that the Archaic Period should be said to continue thru the reign of Henry III and the Strict Period to begin only with Edward I.

Social Interests. The only social interest protected in the times of the Normans and the first four of the Plantagenets was the social interest in peace. These Plantagenets and the Normans were, like the Anglo-Saxons, interested in keeping the peace. The thing which characterized their work, and distinguishes it from that of the Anglo-Saxons, was the more effective way in which they protected this social interest. As has been said, they did not entirely supplant vengeance and self-help until the very close of the period, but continued to regulate them; but their regulation was much more perfect than was that of the Anglo-Saxons. They protected the social interest in peace by changing and enlarging the private antecedent rights, by the recognition of certain public rights, by creating new remedial rights, by creating new courts, and by making available a new and better system of legal procedure.

Substantive Law. The private antecedent rights recognized were those recognized in Anglo-Saxon times, personal safety, family, and property. The individual still remained submerged in the family. The serfs were not wholly emancipated, but their status as villeins was better than as serfs. Hence, altho the rights of personal safety and family were recognized both by the civil and criminal law, the right which bulked large was the right of property, and the rights of personal safety and family seemed incidental to the right of property. In other words, all of these rights were bound up in the feudal system.

Feudal System. William the Conqueror introduced the feudal system into England. By his conquest he made good his pretended claim to the English throne, and thereby succeeded to all the public land of the kingdom which had already come to be regarded as belonging to the king as supreme lord of the realm. He was also entitled to all the land of those who had opposed him, on the ground that it was forfeited to him under the customary law; and in putting down rebellions in the years following his victory at Hastings he increased these forfeitures. Those of the English who had not forfeited their holdings to him and who were willing to accept him as king surrendered their holdings to him and received them back from him as supreme lord. In this threefold way all the land of the kingdom became the king's land. The process was complete within twenty years after the Conquest. The feudal system was based on the doctrine that all the land in the kingdom was owned by the king, and as soon as William had established this doctrine the foundation for the feudal system was laid. He then proceeded to establish the next great characteristic of the English feudal system, that all land was held either directly or indirectly of the king. That is what is known as the theory of tenure. The king granted lands to lords, called tenants *in capite*, for military services to be rendered by them. These lords in turn regranted in smaller subdivisions parts of the land which they had received to their tenants or followers for military or agricultural services to be rendered to them and military service to be rendered the king as lord paramount (a peculiarity introduced by William I from Anglo-Saxon law). The second grantees in the same way could grant out parcels of their land to others, and so

on indefinitely, but the process of subinfeudation was stopped by the Statute of *Quia Emptores* passed in 1290 which enacted that in case of any grant by a lord to his followers the latter should hold not of him but of his lord above him. However, this statute did not apply to fee simples, nor to tenants *in capite*. The land granted by a lord to his followers, in any of these cases, was known as a manor and consisted of the demesne land, which the lord took especially for himself, land granted by him to tenants by subinfeudation and divided up into smaller manors, folkland, tenemental land, and waste land used in common.

Services. The services required of their tenants by the king and the other lords who granted out lands were either military, divine, agricultural, or rustic sordid services, and these services gave character to the tenure of the tenants. Those who had to perform military services held by military tenure. Those who had to perform divine services (saying prayers) held by frankalmoign tenure. Those who had to perform agricultural services held by socage tenure. Those who had to perform rustic sordid services held by villein tenure. The unit for determining the amount of military service a knight had to render was called a knight's fee, usually five hides (above 600 acres). The period of service for this unit was forty days. Some of the king's tenants-in-chief had only one fee, but the great lords had many and a few had as many as fifty. The term "barony" was applied to the greater holdings. When Henry II substituted scutage, or a money payment, for military service, a knight's fee was commuted to forty shillings. There were some other kinds of knight's services. One was called grand sergentry, which consisted of rendering some special service to the king. Another was called cornage, which consisted of winding a horn to warn the people of the coming of an enemy, generally the Scots.

Incidents. Besides the services, above named, there were a number of incidents connected with feudal tenure. There were two sentimental incidents, homage and fealty. Homage was a ceremony where the tenant knelt before his lord and told him he became his man, after which the lord kissed him. Fealty was an oath of allegiance to the lord taken by the tenant. Homage was an incident of military tenure and sometimes but not usually of socage tenure, but not of the other

tenures. Fealty was an incident of all forms of tenure. There were a number of substantial incidents or privileges known as wardship, marriage, reliefs, fines, gifts, and escheat. The privilege of wardship gave the lord the legal capacity to manage the property of minors, under twenty-one years in the case of men and under fourteen years in the case of women, and to take all of the profits arising from the land, except enough to pay for the expense of keeping the wards. The privilege, or right, of marriage gave the lord the legal capacity to choose the person whom a minor should marry, and in case of refusal to marry the person so selected there was a forfeiture of the value of the marriage. Reliefs were in the nature of succession taxes, and were comparable with the modern inheritance taxes. The amount of the tax was generally one-fourth of the annual value of the property in the case of knight-service (in the case of tenants *in capite*, one year's profits), and in the case of socage tenure, one year's rent. By custom the lord was sometimes entitled to the best beast, called a heriot. Fines were taxes on sales. The modern mortgage tax is somewhat analogous. The privilege, or right, to aids, or compulsory gifts, was the legal capacity of the lord to compel his tenants to ransom him in case of capture, to make his eldest son a knight, and to provide the money to marry his eldest daughter. The right of escheat was the legal capacity to have land come back to the lord on the termination of tenure. All of the incidents named above attached to military tenure; reliefs, fines, probably aids, and escheats attached to socage tenure (with the exception of gavelkind); wardship, relief, fines, and escheat attached to copyhold tenure; but nothing is known of any substantial incidents which attached to the other forms of tenure.

Tenure. The highest form of tenure was tenure in chivalry, or military tenure. It was free but uncertain. The next highest tenure was socage. It was free and certain. The tenants under both of these forms of tenure were freeholders. Pure villeinage tenure was base and uncertain. The interests were below freeholds. This tenure later developed into copyhold tenure. Privileged villeinage was base and certain. The interests were like freeholds.

Estates. Under the feudal system, no one except the king could own land allodially, as people had in Anglo-Saxon times;

their right was only a right to hold it. This right might be for a longer or shorter time. The period during which land was held was called an estate. This period might be at will, for years, for life, or for the life of a person and his heirs, etc. Under military and socage tenures the tenants generally had an estate of indefinite duration, which meant that they could enjoy the land for their lives and at their death it would go to their heirs, or to the heir of their bodies, on the principle of primogeniture as soon as that principle was established (which was before the reign of Henry II), and among the children equally prior to that time. At first the land could not be alienated, but before the time of Edward I it became the rule, not only that a tenant could alienate his land by feoffment or grant when it was granted to him and his heirs; but also when it was granted to him and the heirs of his body, because it was held in the latter case that having heirs of his body was merely a condition and that as soon as he had heirs of his body he had a fee simple estate which he could transfer as much as in the first case. Before the right of alienation grew up the heirs took from their ancestor's grantor. Thereafter their ancestor was complete owner (as above explained) and they took from him by descent. Villein tenants during the period now under consideration held land only at the will of their lord. Estates for years and future estates were probably recognized by the time of Henry III, but they came into more common use in the time of Edward I (Strict Period) after the Statute of *Quia Emptores* had abolished subinfeudation. Henry I, by his Charter of Liberties, enacted that testamentary disposition of personality should not be interfered with, and thereby continued the Anglo-Saxon law as to chattels. Wills of land also were probably permitted by the Anglo-Saxons, but under the feudal system no will of land was permitted from the time of William the Conqueror to the Statute of Wills (1540), and this applied to non-military as well as military tenures. Equity found a way to evade this rule to some extent before the rule was changed by the Statute of Wills. Dower in the time of the Anglo-Saxons depended upon express gift of the husband, and this continued to be true up to the time of Glanville (Henry II), but by the time of Henry II the widow had the right to a life estate in one-third of the estate of inheritance of her husband of which

he was seized during coverture, unless he provided for her by jointure. Magna Charta repeated this rule. Curtesy, the life estate of the husband in all the estates of inheritance of the wife of which she was seized during coverture when there was issue capable of inheriting, was also established by the time of Henry III, which was also the time of Bracton.

Contracts. The contracts recognized in this period were the promise under seal and the deliver-promise and surety-promise.

Criminal Law. William the Conqueror allowed the Anglo-Saxon theory of the king's peace to remain, and shortly after his coronation extended it so as to put the whole country under the Pax Regis. It then became an offense against the Crown for anyone to commit an act of violence within the realm. The Norman lawyers also altered very much the simple law of treason of Alfred, by developing the idea of the feudal tie between lord and vassal, so that they were inclined to treat all offenses personally distasteful to the king, as overlord, as treason. Thus about the time of Henry II it was treason to kill the king's deer. The law of homicide, rape, assault, robbery, and theft became practically the same as in the law of England today. The church borrowed the inquest from the Frankish kings. It got jurisdiction over crimes thru supplanting vengeance by sanctuary, which developed into benefit of clergy. The king got jurisdiction thru the gradual extension of the idea of the king's peace.

The distinction between crime and tort began as early as Glanville. A crime was a breach of the king's peace, a disturbance of the order of good government, prosecuted by the Crown, tho at the instance of a private accuser, and hence criminal cases were called pleas of the Crown. A tort was a wrong committed against an individual; the same act might be a crime but not necessarily so. If it was, it had to be tried separately, and the criminal penalty was quite distinct from the compensation paid the sufferer. The final separation of tort and crime came in the reign of Henry III, when the writ of trespass was invented. Breaches of contract were also recognized as separate legal wrongs.

Remedies. That part of the Archaic Period covered by the reigns of the Normans and the first Plantagenets not only enlarged the antecedent rights above described, but also gave some new remedial rights. These may be classified, like the

wrongs for which they were given, as criminal, tort, and contract.

The criminal remedies of the state were no longer confined to fines but became very much as they are today, except that there was a strong inclination to impose the capital penalty for slight offenses. The accused also acquired some criminal remedies in this period. According to Magna Charta and the principles claimed prior thereto, it was wrong to delay justice, and four writs were invented, during the times of the Normans and the first Plantagenets, to protect the subject against lying long in prison without trial. These were the writ *de odio et atia*, issued out of the King's Bench to the sheriff commanding him to hold an inquiry to determine whether or not he was holding a prisoner in custody upon a charge of murder on reasonable suspicion or only for malice, and if the latter to admit him to bail; the writ of main prize, also directed to the sheriff, directing him to take pledges in a fixed sum for the prisoners; the writ *de homine replegiando*, addressed to the sheriff, commanding him to repledge or take bail for a prisoner in custody; and the high prerogative writ of *habeas corpus*, directed not to the sheriff but to the jailer, ordering him to bring the body of the prisoner with the cause of his detention to the king's court, so that the judges might determine whether or not the prisoner ought to be allowed bail. The first instance of the use of the writ of *habeas corpus* is not found until the time of Edward I.

The civil remedies were largely restorative. Chief among these were the real actions: writ of right to try the title to freeholds; the assize of novel disseisin and the assize of *mort d'ancestor* to regain possession by the one last seized; the assize of *d'arrein presentment* to determine who made the last presentment; and the writ of entry to regain possession for those last seized in other classes than those covered by the assize of novel disseisin and the assize of *mort d'ancestor*. The writ of right issued out of the Curia Regis probably as early as William the Conqueror. The assizes and the writ of entry were known by the time of Henry II. Real actions would lie only for freeholders. Hence the term "real property" came to be applied to freeholds only, and leaseholds were classed as personal property. However, by the time of Henry III, Bracton informs us that the tenant obtained a writ of

trespass *de ejectione firmæ* by which he could recover possession of land as well as damages, so that it had the same effect as a real action. It is interesting to note that this action later developed into the action of ejectment, a mixed action, which became available for freeholders as well as leaseholders, and supplanted all of the real actions. To be compared with real actions there were certain personal actions, including debt, detinue, trespass *vi et armis*, deceit, account, and covenant. Debt and detinue were available before the time of Glanville (Henry II); covenant and deceit were available before the time of Henry III; and trespass and account during the time of Henry III. Debt and detinue were at first one and the same action. Debt would lie for a stated sum of money due by the defendant to the plaintiff as his property, and detinue for a chattel thus owed. At first the difference between actions *ex contractu* and *ex delicto* was not strongly marked, but of course debt was really an action of contract and detinue an action of tort, and this distinction was recognized at least as early as the time of Bracton (Henry III), and the action of debt was separated from the action of detinue. Covenant was a contract action. Account was really an action of quasi-contract. Covenant lay to enforce a promise under seal. Account lay to enforce obligations imposed by law upon bailiffs, guardians, and receivers. Trespass was the remedy for a multitude of wrongs of all sorts, such as trespass *quare clausum fregit* (land), trespass *de bonis asportatis* (goods), and trespass to person (battery, false imprisonment). In all of these actions, except detinue, the remedies were not restorative but compensatory. The plaintiff, if he recovered, recovered damages.

Courts. In considering the legal redress afforded by the Normans and first Plantagenets, we should first consider the courts of their times. William the Conqueror undertook to centralize the administration of justice. He left the Anglo-Saxon local courts standing, nominally without curtailment of their powers. But he established a Curia Regis, or council, in place of the Anglo-Saxon witanagemot, composed of officers of state, barons, and judges, to which he gave criminal and civil jurisdiction over all matters (original and appellate) and also power over all matters connected with the exchequer, such as feudal reliefs, fines, and forfeitures; and

he gave it, what the hundred and county courts had not generally had, the power to enforce a judgment against a powerful wrongdoer. As business increased, a division of labor became necessary, and the term "Curia Regis" was applied to those who acted as a judicial body, while the councilors of the king took the name of *concilium ordinarium*. This division took place in the time of Henry II. A further division of the Curia Regis became necessary in the time of Henry II, and a Court of Exchequer was established to deal with financial matters and the collection of the royal revenue. The judges of this court were called barons of the Exchequer, with the chief baron as president. Another court was carved out of the Curia Regis in the time of Henry III by the formation of the Court of Common Pleas, or Common Bench. Its jurisdiction extended to all civil cases between subject and subject, which were called "common pleas" to distinguish them from "pleas of the crown". It had exclusive jurisdiction in all real actions, debt, and covenant. Magna Charta provided that it should sit in one place, and Westminster Hall was fixed upon. The judges of this court were called justices, with the lord chief justice as president. After the establishment of this court there remained in the Curia Regis all criminal jurisdiction, all appellate jurisdiction from inferior courts, and any civil business not transferred to the Exchequer and Common Pleas. The Curia Regis came to be called "Bancum Regis", and then the Court of King's Bench. It became a separate court in the time of Henry III. It absorbed all the business of the Curia Regis except perhaps the ultimate appeal. It had two sides, a crown side and a plea side. The crown side was concerned with criminal matters, appeals from inferior courts, liberty of the subject, and control of corporations. It issued the writs of *mandamus*, *habeas corpus*, and *quo warranto*, when they came into use in the Strict Period. On the plea side it had jurisdiction of all actions of trespass. The King's Bench was the highest court in the land. The king was supposed to sit there, altho no king until James I actually did sit in it. It had appellate jurisdiction over the Common Pleas.

In addition to the above courts, during this period there was established a system of itinerant justices (justices in eyre). They were appointed and sent by royal commission, but gen-

erally justices of the Curia Regis were chosen. The eyre of each of the judges generally lasted seven years. William I was the first to send judges on circuit. At first the criminal jurisdiction of the local courts was left untouched, except that when a justice in eyre was within a county he, instead of the sheriff, presided as judge. By the assize of Clarendon Henry II provided for inquests by twelve lawful men of each hundred and four of each township into robberies, murders, thefts, etc., and the presentation of criminals to the justices in eyre. Magna Charta (1245) forbade sheriffs, constables, coroners, and all bailiffs of the king from holding pleas of the crown. In this way criminal jurisdiction was reserved almost exclusively to these justices by the time of Henry III. By this time also the action of trespass had become so popular (because tried by jury) that most civil business was drawn into the king's courts. The justices in eyre had the same jurisdiction as the common law courts, except that their exchequer jurisdiction was limited to half a knight's fee. This supplanting of the local courts by the king's courts marks the end of the Archaic Period.

Other courts of the Archaic Period which we must consider are the Court Baron, the Law Merchants' Courts, and the Ecclesiastical Courts. The Court Baron was a manorial court composed of the freeholders of the manor, with the steward as a kind of clerk, but it was not a court of record. It had jurisdiction to try by writ of right claims to land within the manor, and personal actions, where the amount claimed was not more than forty shillings; but the former proceedings could be removed to the county court, and the latter to the king's courts. After judgment the court at Westminster could rehear the case on a writ of false judgment. There was another side of the Court Baron, presided over by the steward as judge, exclusively for the copyholders of the manor. The Law Merchant Courts were of two sorts: (1) maritime, which were local courts held by an admiral in seaport towns as early as Henry I, and (2) commercial, which were courts in towns held by the mayor, lord, and guilds for the merchants. In the maritime courts was developed admiralty law, and in the commercial, the law of insurance and negotiable instruments. Before the Conquest there were no separate Ecclesiastical Courts. The bishop sat along with the earl

and shire-reeve in the county court. William I allowed the clergy a separate jurisdiction, and no fewer than seven kinds of Ecclesiastical Courts arose. The lowest of these was the Archdeacon's Court. An appeal lay from this to the Consistory Court of the bishop of the diocese which also had some concurrent jurisdiction. The Court of Peculiars was another court of original jurisdiction over parishes in the province of Canterbury. The Prerogative Courts of Canterbury and York and the Court of Arches were appellate courts, and Henry VIII established another appellate court called Court of Delegates. An appeal lay to the Pope down to the time of Henry VIII, altho the Constitutions of Clarendon undertook to take this away. The Ecclesiastical Courts had jurisdiction over all ecclesiastical matters, like heresy, schism, and validity of holy orders; over matters of marriage, legitimacy, divorce, wills of personalty, and granting of letters of administration; and over all cases, whether civil or criminal, where one of the parties was a clerk. The law applied by the Ecclesiastical Courts was canon law, and the procedure followed was canon law procedure. The law of wills, marriage, and divorce is therefore of canon law origin. Henry II tried to get control of church courts (in the Constitutions of Clarendon), but in the end he failed.

The courts of the last part of the Archaic Period, therefore, were the Anglo-Saxon local courts of the county and hundred; and the Court Baron of the manor (which took the place of the court of the Anglo-Saxon thegns); the Law Merchants' Courts; the Ecclesiastical Courts; and the King's Courts. This was an elaborate system of courts as compared with what the Anglo-Saxons had had.

Legal Procedure. Yet great as was the work which the Normans and the first Plantagenets did for the organization of courts and for substantive law, both antecedent and remedial, their greatest work was in the field of procedure.

Writs. The first step in legal procedure in the king's courts (except in cases tried by the assize) was by writ. This innovation was introduced on the establishment of the Curia Regis. In Anglo-Saxon days the plaintiff simply made a verbal complaint to the sheriff, or hundred reeve, or other local judge. But when cases had to be taken up to a central court the situation was different. The king's justices had to depend

upon the sheriff of the county to secure the attendance of the defendant. A verbal message from the court to the sheriff might miscarry or be misinterpreted. Hence there was issued by the chancellor, secretary to the Curia, a brief statement of the case with a command in the name of the king to summon the defendant to appear and answer the complaint. This was called a *breve*, but soon received the Anglo-Saxon name of *writ* (writing), to distinguish it from the verbal complaints in the local courts. Henry II provided that no suit should be started in a local court or any other court except by *writ*. The invention of writs was the making of the common law.

Pleading. By Bracton's time a system of pleading had developed in the king's courts. The plaintiff came into court, and by himself or by his attorney stated his cause of action. The defendant answered, making objection on a point of law, or denying some or all of the facts. The plaintiff then replied, and then the defendant until they arrived at an issue (way out), that is, not a vague indefinite quarrel but a dispute on a particular point. A man could not raise both an issue of law and an issue of fact. In later times these verbal altercations developed into our modern system of written pleadings. An issue of law was tried by the judge alone, an issue of fact by the modes of trial peculiar to this period.

Trial. William I did not abolish the Anglo-Saxon modes of trial by ordeal and compurgation, but he introduced two new modes of trial, the duel (wager of battle) and the jury. The ordeal was abolished in 1218, after it had been condemned by the Lateran Council in 1215. Compurgation was not abolished in England until 1833, but it began to grow unpopular in the Archaic Period. However, this was the only way of trying an action of debt, and largely accounts for that action's finally becoming obsolete. Proof of death today is still according to the form of Anglo-Saxon proof by witnesses (slightly different from compurgation). The action of account was tried before auditors.

Wager of Battle. The duel, or wager of battle, did not apply to pleas of the crown, because the sovereign could not be challenged to fight. Yet there was one exception to the rule, one case where vengeance was not abolished but regulated. In cases of murder and manslaughter any blood

relative of the slain man could "appeal" against the slayer. The latter then threw down his glove and claimed combat. If the accuser did not take up the challenge the accused went free. If the challenge was accepted, a day was appointed, and in lists presided over by the sheriff, or itinerant justices, the combat took place, beginning at sunrise and lasting to sunset if not previously determined. If the accused prolonged the fight to sunset he was declared guiltless, and the accuser was fined and declared infamous. If the accused lost he was hanged if still alive. Appeal of felony continued to the Tudor period. It was claimed in 1817 by a man named Thornton, who was acquitted when his accuser declined the challenge. Two years later the appeal was abolished. Wager of battle also obtained in "affairs of honour". The duel was a mode of trying issues of fact in actions commenced in the king's courts. The writ of right was tried either by duel or jury, and the judgments in the assizes were without prejudice to later settlement by battle. In civil cases champions (or *prochein amys*) fought, in order to guard against ending the suit by killing one of the parties to the action. Wager of battle had almost died out in civil actions by the end of the reign of Henry III, but it was not abolished; it fell into disuse because the writ of right ceased to be used. There is a case on record as late as Elizabeth.

Jury. The great mode of trial introduced by the Normans was trial by jury. The origin of the jury in criminal trials is wrapped in more or less doubt. Alfred the Great established a system of frankpledge, or presentment of criminals for trial by sworn men of the hundred, and some think this was the origin of the grand jury. The Frankish kings had employed a sworn inquest for the purpose of detecting crime, that is, an officer of the king called upon neighbors to declare the truth about crime. William I, in compiling the *Domesday Book*, introduced the sworn inquest into England. The sheriff and certain selected men had to hold a sworn inquiry into the local customs, tenures, etc., and to take a kind of census of the population. The Norman kings used the sworn inquest for fiscal and administrative purposes. The sworn inquest survives today in the coroner's inquest. Others think that the grand jury had its origin in this sworn inquest. At any rate the accused was presented or indicted by some

body of men. While the ordeal obtained he could then be tried by ordeal. But after the abolition of the ordeal, in those cases where wager of battle did not apply, there was no method of trial except by a jury, either the same one which presented him or a second one. But a man could not be compelled to be tried "by the country" unless he consented. He was therefore sometimes tried by a second jury, and sometimes he was asked to plead and if he refused suffered *peine fort et dure* until he was pressed to death if he remained contumacious. By the time of Bracton when a man put himself upon the country, after he had been presented by the hundred jury, he was tried by a jury of twelve (inquest jury), which determined his guilt or innocence of their own knowledge and not on evidence adduced before them. This was the origin of the petty jury. The judge might cross-examine the petty jurors to discover the reasons for their verdict, and impanel a new jury if the reasons were unsatisfactory, but it was not until long afterwards that the petty jurors lost their character as witnesses and became judges on the evidence given in open court.

Whether or not the sworn inquest was the origin of the petty jury, in criminal cases, it was the origin of the jury in civil causes. Henry II extended the privilege of jury trial in the king's courts to all of his subjects. The county and hundred courts refused to do this. Jury trial gradually became popular, and this helped the king's courts very much in the process of supplanting the local courts. Trespass was tried only by jury trial. Hence the popularity of jury trial not only tended to bring business to the king's courts, but to make trespass supplant other forms of action. The writ of right (grand assize) was triable by jury or battle, at the choice of the defendant. The assizes of *novel disseisin*, *mort d'ancestor*, *d'arrein presentment*, and *utrum* were triable only by jury. The writ of *ejectio firmæ* was a special writ in trespass. These actions also tended to give the king's courts jurisdiction over the great mass of judicial business at the time, for real property included most of the substantive law then known. But it must be borne in mind that these civil juries, like the criminal juries, decided facts of their own knowledge rather than as judges of facts. This change in the nature of the jury came only at a later time.

Sources of Law. The sources of the law which the courts applied in this period were the Anglo-Saxon common law, or dooms, as developed by a French-speaking court; the canon law, as introduced by the Roman Catholic Church, especially in probate, divorce, and admiralty matters; Roman law, as applied in maxims, method, spirit, logic, and a few principles; and enacted law. Any enacted law of the period was not enacted by Parliament, for tho Simon de Montfort captured the king and founded the House of Commons in the reign of Henry III, it did not actually begin for thirty years. The enacted law of England in this period was law promulgated by the king with the advice of the Curia Regis. It consisted of four documents: Magna Charta (1215), Forest Law (1217), Provisions of Merton (1236), and the Provisions of Marlborough, enacted during the reign of John and Henry III, besides the Constitutions of Clarendon and other assizes of Henry II. Magna Charta established the rights of the church, the barons, freemen, and villeins, gave the guarantee of due process of law, and provided for taxation only by consent. All of the rest of the law was judge-made law, both substantive law and procedure. The judges developed a real common law.

Lawyers. A class of professional lawyers grew up in this period. They were probably mostly ecclesiastics and versed in the canon and Roman law and yet they were the chief instruments in moulding the new common law of England. A particular class of lawyers, known as sergeants-at-law (members of the Order of the Coif), had a monopoly of the practice in the Common Pleas, and this monopoly continued until the time of Victoria. Glanville (Henry II's chief justiciar) wrote the first English law book. It was in Latin and was wholly Roman law except as it treated of legal procedure. Bracton, an ecclesiastic but king's justice in the time of Henry III, wrote another treatise in Latin in which he filled in the gaps in English case law with Roman law.

CHAPTER XI

STRICT PERIOD

THE Strict Period in Anglo-American law began with the reign of Edward I in 1272 and continued to the reign of James I, or, to be strictly accurate, ten years into the reign of James, when in 1613-1616 Chancellor Ellesmere triumphed over Lord Coke, and the Period of Equity began. But, just as the Archaic Period was towards its end becoming the Strict Period, and for about one hundred years was almost as much Strict Period as it was Archaic, so the Strict Period was, towards its end, becoming the Period of Equity, and much of the work of equity dates back more than a hundred years prior to 1613. The Strict Period was less than one-third as long as the Archaic Period. The Archaic Period lasted over eight centuries, altho how much more than eight centuries we do not know. The Strict Period lasted less than three and a half centuries, and from this time should be deducted almost a century occupied by the War of the Roses during the time of the Lancasters and Yorks (fifteenth century), when there was practically no legal development.

Characteristics. The end of the law in the Strict Period, as in the Archaic Period, was the protection of the social interest in peace (and perhaps general security). This was done not by regulating vengeance and self-help, but by the substitution of law for force and private warfare. The period contributed some new antecedent rights, and some new courts and legal procedure, but its principal contribution was remedies. The emphasis in this period was placed upon remedial rights. However, probably the chief characteristic of the period was formality and technicality. The common law lawyers of the day regarded the common law as completely developed. They regarded the great outlines of criminal law and private law as fixed. All that it needed was statement and prescission. How mistaken they were is shown by the Period of Equity, but any generation is liable to make such a mistake.

Plantagenets and Tudors. As has been suggested, most of the legal development in this period occurred during the reigns of the last of the Plantagenets and of the Tudors. There was

almost no legal development in the times of the Lancasters and Yorks. The greatest development occurred during the reign of Edward I, who has been called by Chief Justice Herle "the wisest king who ever was", and by Reeves the "English Justinian". He perhaps labored more than any of his predecessors to improve the judicial policy of England in all of its parts, and his endeavors, during his long reign, were so successful and so permanent in their effects that his reign is memorable in the history of Anglo-American law. The new law developed in this period by the courts of equity was judge-made law; some novel principles in the disguise of antique garb (circumventive fictions) were introduced evasively into the common law, on contracts, family settlements, tenure, and remedies; but most of the development in other parts of the law was due to legislation. The reign of Edward I is notable for the celebrated statutes passed therein. Parliament was now established. Edward I summoned the first model Parliament (kings, lords, and commons), and promised not to tax without the consent of the subjects. The House of Commons did not become distinct until the time of Edward III. Then it voted supplies, but it did not legislate; it petitioned. It did not legislate until the time of Henry VI (1461). After Edward I, except for the evolution of the Court of Chancery under Edward III, legal development consisted for the most part of the development and interpretation of the law as it had been left by the English Justinian, until after the Wars of the Roses. Parliament abandoned the idea of controlling the common law. During the last part of the fifteenth century it seemed ready to decline and fall. But Henry VIII in the sixteenth century saved it for his despotic purposes, and during his reign there were passed many important statutes. After that judges soon ceased to claim the privilege of disregarding statutes, but rather all law came to be defined as the command of a sovereign.

Lawyers. A class of professional temporal lawyers grew up in the time of Edward I. For a century previous an ecclesiastical bar had existed, divided into two classes: advocates, who pleaded, and proctors, who represented the clients. Similar groups, few in number, now grew up around the king's courts, also divided into two classes: attorneys (solicitors), like proctors, (1) for the king and (2) for litigants; and

counsel (barristers), like advocates, (1) a friend, who spoke for litigants, and (2) sergeants-at-law in the pay of the king. The king brought both classes under the control of the judges and gave them a monopoly of practice. The judges were no longer chosen from among ecclesiastics but from the body of pleaders in the king's court. The reason for this was the fact that the church opposed the appointment of the clergy. But the clergy continued to serve as clerks of court. Britton, Fleta, and Horn, noted law writers, wrote their treatises in this period. From the standpoint of the legal profession the thirteenth century was brilliant. From this standpoint the fourteenth, fifteenth, and sixteenth centuries were as dull as the thirteenth had been brilliant. The common law was committed to judges and lawyers who knew their own business but nothing else. Under them the law became an occult science. They were mere logicians. The sky might fall, the War of the Roses might rage, but they continued the even course of their argumentation. The law became full of delays as early as Edward III. Evidence of the general dissatisfaction with the administration of justice is found in the reign of Richard II in Wat Tyler's Rebellion and the banishment of the judges (1388). The education of the legal profession was taken away from the universities, which trained civilians, and intrusted to Inns of Court, which were clubs, colleges, and trade unions combined. The Inns of Court were therefore responsible for the kind of lawyers of the day. Maitland says that the one thing distinctive of mediaeval England was the Inns of Court. With Fortescue and Littleton, in the last of the fifteenth century, the period seemed for a time to be becoming more literary, but the hopes of this period were not fulfilled, and the publications in the sixteenth century were little more than alphabetical abridgments. The common law was made tough by these common law lawyers, but perhaps it was this toughness which saved it from the Tudors and the Stuarts.

Language. The legal language of this period was, for statutes, Norman French before the time of Richard III and English thereafter; and for records, Latin until 1731 in the next period.

Rise of Equity. The one great ameliorating influence in this period was that of the Court of Chancery, or Equity, and

altho its strength did not become great enough to give character to the law until the time of James I, yet it did accomplish many reforms in both substantive law and legal procedure in the present period. For this reason it may be best to give an account of the origin and accomplishments of the court in this period before undertaking to describe the antecedent rights, remedial rights, courts, and legal procedure of the period in general.

When the three courts—Exchequer, Common Pleas, and King's Bench—were carved out of the Curia Regis, not all of its legal business was taken away from it, or from the Council, from which it had been separated. This legal business consisted of appellate jurisdiction over the three courts and original jurisdiction over matters not given to them. This was the remnant of the King's prerogative of justice. This was now exercised by the king in his Council in Parliament. Parliament was composed of the magnates of the realm; the Council of such of these as the king especially called to advise him in judicial business. By the time of Richard II the Council no longer sat in Parliament, and in the course of time the Lords (of Parliament) only heard appeals by writ of error. The chancellor was the king's first minister, president of the Council, and usually a bishop, and he gradually took on the legal work which the Council had to do. All writs had to issue out of his office, for he was the head of the legal department. Petitions were addressed to the king and considered by him in Council. Where they were within the common law they were met by the issuance of a writ. Where they were not they were decided generally by the Council. By the time of Edward III petitions began to be addressed directly to the chancellor, instead of to the king or Council, but it is doubtful whether at this time there was a Court of Chancery apart from the Council. But slowly people began to think of him as having a jurisdiction distinct from that of the Council, common law (both civil and criminal), as well as equity. The distinction between common law and equity jurisdiction of the chancellor was made about the time of Henry VI, and about the time of Henry VII the modern Court of Chancery arose. Thus the Court of Chancery was created out of the Council very much as the courts of Exchequer, Common Pleas, and King's Bench had formerly been created.

The Court of Equity invented new procedure, new remedies, and some new antecedent rights. After a little it was compelled to give up its common law jurisdiction, and its jurisdiction might have come to naught had it not been for the curious episode of uses and trusts (antecedent rights created by equity) and the device of the subpoena. These enabled it to survive until the end of the present period, and then Lord Ellesmere won out in his struggle with Lord Coke²⁴ and equity added an appendix to the common law. The writ of subpoena was said to have been invented by Waltham, bishop of Salisbury and keeper of the rolls in the reign of Richard II, but he probably only adapted it to the use of the Court of Chancery. This writ was so called because it commanded the person addressed to appear in the Court of Chancery on a certain day and answer the complaint of the plaintiff. It was flexible and adaptable to any form, and it was efficacious because if the defendant did not appear he could be fined for contempt of court. The chancellor's jurisdiction was based on conscience, and the doctrine of uses was based on the idea that the person really entitled, in equity and good conscience, to the enjoyment of property was not necessarily the person in actual or legal possession of it. The Court of Common Pleas would recognize seisin only as the basis of rights. The writs of right and assizes were framed to give protection to seisin. The Court of Chancery asked whom did the last real owner intend to have the benefit of the property, and said such person had the conscientious right to it tho he was not seised of it; and made whoever had the possession recognized by the common law give the use and benefit to the one who had this conscientious right. Thus there came a separation between the use (recognized by Chancery) and seisin (recognized by the Common Pleas). Uses were called equitable estates, and became fully established by the end of the reign of Richard III. An attempt was made in the reign of Henry VIII to abolish uses,²⁵ and it seemed to succeed for about one hundred years, when they were again revived in the form of trusts. Equity developed some contract law, especially in connection with conveyancing, where it created the bargain and sale deed and the covenant to stand seised. In one case

²⁴ See life of Lord Coke, *infra*.

²⁵ Statute of Uses (1536). See *infra*.

in the fifteenth century it decreed specific performance of an agreement before the common law courts would recognize an agreement.²⁶ It also assumed jurisdiction over mortgages, guardianship of infants, property rights of married women, fraud, accident, and mistake. Equity took from the Ecclesiastical Courts much jurisdiction which the common law courts by writs of prohibition would not allow them to exercise. Before the creation of the Court of Star Chamber equity exercised some criminal jurisdiction.

Equitable Remedies. The principal remedies which equity discovered in this period were specific performance, which came into frequent use in the sixteenth century to enforce performance of a promise where justice seemed to demand it; injunction, which was first used in tort cases to restrain acts of waste (Elizabeth's time),²⁷ and which before the end of the Yorkist line was used to restrain a litigant from proceeding with his action in a common law court; discovery, whereby a defendant was compelled to testify in writing on oath as to facts known only by him or as to what documents he had, upon interrogatories filed in a bill in chancery, so that the answers could be used in a common law court (at a time when the defendant could not be compelled to testify); and account, which largely supplanted the common law action of account.

Equitable Procedure. The procedure in chancery was entirely different from that at common law. All proceedings were in English. No writ was required, because the chancellor exercised the prerogative of the king to grant relief as a matter of grace. The proceedings were commenced by a petition, afterwards called a bill. This was the first pleading. If it disclosed a case, a subpoena was issued to the defendant to appear and answer on oath. This answer soon was in writing. Hence the pleadings were written. They did not produce an issue. No jury was used. The evidence was taken in the form of written affidavits. This procedure was taken by the chancellors from the Ecclesiastical Courts.

For interlocutory work the chancellor had the assistance of a body of clerks. Chief of these was the master of the rolls, whose primary duty was to take care of documents and

²⁶ *Cokayn v. Hurst*, in "Select Cases in Chancery", 10 *Selden Soc.*, No. 142.

²⁷ Anonymous, *Moore* 554, pl. 748.

to record judgments, but sometimes the chancellor delegated to him the hearing of causes in the absence of his superior. Because of this notion that he could sit only in the absence of the chancellor, when Lord Nottingham (Charles II) sat every day all day, the master of the rolls sat only from six to ten in the evening. A statute of 1833 enabled him to sit all day. Other clerks were called masters in the time of Edward III. Cardinal Wolsey (Henry VIII) used to refer demurrers to masters. Lord Badon (James I) stopped this practice, but inaugurated the practice of referring the taking of accounts to a master.

The social interest in general security, which was emphasized in this period, was protected under the *egis* of the common law lawyers by the old law developed in the Archaic Period with some changes in the direction of certainty in the law of antecedent rights and the law of legal procedure, and with many additions to the law of remedies in the form of new writs. The law of the Strict Period was essentially a law of writs, and was as technical as the writs.

Criminal Law. A few changes in criminal law occurred in this period. Imprisonment for debt was introduced. Edward I enacted a law against sedition. The law of treason was modified by the statutes of treason of Edward III so as to cut the offense down to compassing or imagining the death of the king, queen, or their eldest son; violating the queen, the king's eldest unmarried daughter, or his eldest son's wife; levying war against the king in his realm or adhering to his foes; counterfeiting the king's coin or seal; and slaying the chancellor, treasurer, or judges while in the discharge of their duty. During the Wars of the Roses this statute did not afford much protection, for if a man pleaded that he had been supporting the king *de facto* he was hanged for not supporting the king *de jure*. Henry VII assented to an act by which treason was defined as an offense committed only against the king *de facto*.

Real Property. While real property had attained most of its development before the time of Edward I, some important changes in the law occurred during his reign and the remainder of the Strict Period. A number of celebrated statutes were enacted during the reign of Edward I. One of the most important was the Statute *De Donis*, (1285), which created

the estate tail. Prior to this statute, where the feoffor tried to keep land in the family of the feoffee by a limitation to the feoffee and "the heirs of his body", and if there was no family to have the land revert to the feoffor, the lawyers had interpreted this to create a fee simple on condition that he have heirs of his body. The Statute *De Donis* reversed this interpretation of the lawyers, so that the feoffee's estate was inalienable. It was passed in the interest of the great land-owners, who wanted to tie up the title to land so that no one could sell it. For a period of nearly two hundred years this statute was obeyed and estates in England became quite generally entailed. Then the lawyers again found a way to circumvent the big land-owners. They did this by devices known as warranty, common recovery, and fines, which were really collusive suits allowed by the judges, it is said, at the instance of the king himself. For example, in case of a common recovery, if an estate had been granted to A and the heirs of his body and A wanted to break the entail, he would sell the land to X; X would then sue A, claiming the land; A would admit his claim; and the court would enter judgment that the land belonged to X and this judgment could not be disturbed after a year and a day.

A second most important statute of the time of Edward I relating to real property was the Statute *Quia Emptores*, enacted in 1290, which abolished subinfeudation by providing that if a lord granted a new manor his tenant should hold not of him but of the lord paramount above him. In this reign were also passed two statutes of mortmain forbidding the holding of land by religious persons and corporations, because they were not liable for the services and privileges due the lord; and the Statute of Gloucester (1278), which made tenants for life, curtesy, dower, and tenants for years liable for waste.

Before Littleton's time (Henry IV) pure villeins had become tenants by copy of court roll according to the custom of the manor so that from being tenants at will they had an alienable interest in the land, and if they were ejected by their lord they could maintain trespass against him.

Uses. By the time of Richard III equity had developed the equitable estates called uses. These equitable estates were popular because thereby the tenants could avoid their feudal

dues, make the property subject to will, create new conveyances, free estates of dower, and avoid the Statutes of Mortmain. As a consequence a campaign against uses was started by the king, lords, wives, and heirs, and they finally procured the passage of the celebrated Statute of Uses in 1536. The object of this statute was to destroy uses. It undertook to do this not by making the uses void but by converting the uses into legal estates, and making the holder of the legal title (seisin) a mere conduit for the title. The statute did not apply to leaseholds, copyholds, active trusts, or to second uses. Hence the lawyers within a hundred years discovered that all that was necessary to keep alive the old law of uses was the device of a second use. This revived the equitable uses, but after this time they were known as trusts instead of uses. However, if the device was not employed, the statute would operate. The consequence was that the statute not only did not abolish uses, but it transferred into the common law all the equitable liberality in regard to estates and conveyancing. The common law would not permit a fee simple to be cut down by a succeeding estate which would lap back on it; nor a gap, when the seisin would be in abeyance. Equity permitted both of these things in what were called shifting uses, resulting uses, and springing uses. Since the statute made the equitable estates legal these estates became good common law estates, and were called conditional limitations.

Suppose A enfeoffed X and his heirs to the use of B for life, and one day after B's death to the use of C and his heirs. At common law, prior to 1536, X and his heirs would have had an estate in fee simple; and if A had enfeoffed B for life, instead of X and his heirs, an estate to begin one day after the termination of this life estate would have been void and A would have had a reversion in fee. In equity, prior to 1536, X and his heirs would have had the legal title, B would have had an equitable life estate, A would have had an equitable fee simple subject to a condition by way of resulting use, and C would have had an equitable fee simple to take effect as a springing use. After the Statute of Uses B would have had a life estate, A a fee simple on condition, and C a condition limitation in fee simple.

Wills. By the Statute of Wills, passed in 1540, devises of land by a man's last will were permitted, as bequests of personality had been permitted from the earliest times.

Bankruptcy. The law of bankruptcy took its rise in the time of Henry VIII by virtue of a statute of bankruptcy, but this statute was for the aid of creditors not debtors.

Contracts. The modern consensual contract had its origin in this period, altho most of its development has occurred during subsequent periods. During the Archaic Period, the only promises enforced were the promise under seal, and the delivery-promise and the surety-promise,—the former by the action of covenant, and the latter by the action of debt. Simple oral promises were not enforced. This defect in the law was remedied by the common law courts during the Strict Period—probably not for the sake of reform but to keep jurisdiction over contracts away from the chancery court—thru the development of the action of special *assumpsit*, an action on the case in the nature of deceit (or in the nature of trespass according to some authorities), and the action of general *assumpsit*, an action on the case in the nature of debt. As a result of the latter *assumpsit* became both concurrent with debt and available for the enforcement of inferred promises, and as a result of the former, oral promises as well as written became enforceable provided they conformed to certain technical requirements. Special *assumpsit* grew out of actions on the case for the tort of negligence and actions upon the case for deceit upon a false warranty. The action of special *assumpsit* was allowed in the time of Henry IV where a defendant had undertaken (*assumpsit*) to do something for the plaintiff and afterwards was guilty of misfeasance, but it was not until the time of Henry VII that it was allowed for an undertaking followed only by nonfeasance.²⁸ By the end of Elizabeth's reign the action had become of general use.

The common law methods of conveyance under the feudal system were the feoffment, or livery of seisin, to transfer as estate of freehold to a stranger to the original grant by one who was in possession of the land; an oral agreement and entry to create estates less than freehold in possession; and deed to create estates, either freehold or less than freehold, by one who was not in possession (reversioners and remaindermen). During the Strict Period, in connection with the development of uses, equity also developed two new methods of conveyance, the bargain and sale deed where a valuable consideration was

²⁸ *Thorne v. Deas*, 4 Johns (N.Y.) 84.

paid, and the covenant to stand seised where there was no other consideration than relationship of blood or marriage, in both of which cases the man seised of an estate of freehold covenanted to stand seised of the land to the use of another, as in the declaration of modern trusts. After the passage of the Statute of Uses these equitable forms of conveyance became common law forms of conveyance.

Agency. In this period the law of representation, or agency, rested upon the basis of commanded acts,²⁹ that is, the master in torts and crimes and the principal in contracts was liable only where the servant or agent did what he was told to do, or his act was ratified afterwards. The ancient law, which made the master absolutely liable for the acts of his slaves and free members of his household, disappeared after the Conquest with the disappearance of slavery; it did not apply to the acts of villeins: and the more modern doctrine of representation had not as yet developed.

Bailments. The bailee's liability to the bailor in this period was probably that of absolute insurer,³⁰ owing to the fact that the remedy and the only remedy given the bailor against the bailee was detinue, under which the theory was that the bailee owed to the bailor the chattels bailed and he had either to return them or pay for them. The liability of innkeepers for injury to guests did not arise until as late as 1584.

Torts. In the law of torts, the rule in this period was absolute liability. The tort law, like criminal law, was written in blood. The law did not ask whether an act had been committed in self-defense, but only whether the act had been committed. If it had, the guilty party had to make reparation. If he thought he had a defense, he had to sue in an independent action. This was the Strict Period of Anglo-American law! Practically the only tort known to English law prior to the sixteenth century was the tort of trespass. There was no redress for negligence, nuisance, slander, libel, and deceit until the sixteenth century. Other torts, like malicious prosecution, alienation of affections, violation of copyright, and procuring breach of contracts, were not recognized at all in this period.

Remedies. The thing which the common law emphasized in the Strict Period was remedies, which meant writs, for if

²⁹ 7 *Harv. L. Rev.* 330, 332, 335, 334.

³⁰ *Southcotes Case*, 4 *Coke* 83 b.

there was no writ there was no remedy. The substantive law of the period was really the result of writs, or remedies, rather than their cause. The great common law remedy always has been damages. The writs in this period which gave the right to damages were debt, covenant, deceit, trespass, and account—all continuing from the Archaic Period; case available in the fifteenth century; and trover, trespass on the case, and *assumpsit* available in the sixteenth century. The latter were specialized forms of case. Trover was a specialized form of case in the nature of detinue, devised for the purpose of giving damages for the conversion of chattels, at first where the defendant had found them but soon in all cases. Trespass on the case was an action on the case in the nature of trespass, which gave a right to damages for negligent omissions and for injuries caused by independent agents of harm, inanimate things, etc. Special *assumpsit* was an action on the case in the nature of deceit for the recovery of damages for breach of an express promise. General *assumpsit* was an action on the case in the nature of debt for the recovery of a definite, liquidated amount of money. It was a sort of residual action in the realm of contracts. Case was the corresponding residual action in the realm of torts. The various actions on the case were the creation of the clerks in chancery acting under a statute of Parliament enacted in 1289, authorizing them to issue writs in *consimili casu* with old writs. It is not clear why this statute was passed, but one explanation is that it was to enable the common law courts to compete better with the court of chancery.

The ordinary common law writs of the Strict Period which gave other remedies than damages were detinue, replevin, and ejectment. These were all restorative remedies, the first two for chattels, and the last for land. Replevin originally lay only against one who had made a wrongful distress and was holding the goods distrained to compel the payment of a debt. At first if the defendant set up ownership, the replevin had to be dismissed and the plaintiff had to resort to the appeal of larceny or trespass. In Edward III's reign it was held that this claim had to be made before the sheriff had taken the goods. A little later the plaintiff was able to recover the goods in replevin in spite of defendant's claim. Still later replevin became concurrent with trespass, but per-

haps not until the nineteenth century. In the Strict Period at least it was confined to distress cases. Ejectment was originally an action *in personam* called *ejectione firmæ* by which tenants for years could recover possession against ejectors not claiming thru the landlord. This action was free from the technicalities of the real actions, and gradually came into use to escape them by the device of a formal entry and lease to a tenant so that he could sue in ejectment after he was ousted by the claimant in possession. By Elizabeth's time ejectment had almost supplanted the real actions. The next step in the development of ejectment was the use of fictitious persons as the tenant plaintiff and defendant casual ejector. At first no notice was required to the tenant in possession tho the casual ejector was a friend of the plaintiff and a stranger to the property; but later the rule was established that the tenant in possession had to be given notice and by the time of the Protectorate the courts required him as a condition to being admitted to intervene to admit the lease, entry, and ouster, leaving the question of title the only question to be litigated. But the courts held that the judgment in ejectment was not binding between the real parties because in form between fictitious. The whole scheme was an absurd make-believe as silly as a nursery game, but it well illustrates the character of the law in the Strict Period.

Other illustrations of the rigidity of the law in the Strict Period are found in the law of the contract under seal.³¹ The common law regarded this not as evidence of the contract but the contract itself. Accordingly, if the obligee had lost the instrument, or it was destroyed, he had no action, for a *Year Book* judge said, "If the specialty is lost the whole action is lost."³² Likewise if an obligor had executed an instrument because of fraud, or for immoral purposes, or upon an assumption in the offer which was not true, or even if he had once paid the same, if he had neglected to take a release or have the instrument destroyed, he was helpless. Such technicality cried for relief, and it was such technicalities which brought the Court of Chancery into existence. The

³¹ Still further illustrations of the strictness of the law of contracts of the Strict Period are found in the law of that period as to conditions; as to discharge by surrender by accord, by payment by a stranger, by alteration, by merger, and by arbitration; as to assignment; and as to the right of third party beneficiaries.

³² *Y.B.* 24 Ed. III, p. 24, pl. 1.

evils described above were corrected by equity in the next period.

In addition to the ordinary common law writs above named, there were the extraordinary legal remedies of *mandamus*, *quo warranto*, *habeas corpus*, and prohibition. While the writs of *habeas corpus* and prohibition, at least, had been invented in the Archaic Period, there is no evidence of the use of any of them before the time of Edward I. *Mandamus*, now a writ of right, was originally a writ of royal prerogative issued by courts of superior jurisdiction (King's Bench) and directed to subordinate courts, corporations, and the like, commanding them to do something specified. *Quo warranto* was a writ commanding a person to show by what authority he exercised an office or franchise, to prevent the illegal exercise thereof. Prohibition was a prerogative writ issued by a superior court (King's Bench) to an inferior court or tribunal to prevent the latter from usurping or exceeding its jurisdiction. *Habeas corpus* has already been defined as a remedy to relieve against the illegal restraint of personal liberty. All of these remedies were very effective where available, but with the exception of *habeas corpus* they were not available for private individuals against private individuals. Private individuals had need of such remedies. But this defect had to be supplied by equity. *Mandamus* is like specific performance, except that it concerns obligations growing out of official station or duties imposed by law. Prohibition is like injunction, except the latter is directed to parties while the former is directed to the court, or tribunal charged with judicial powers.

Most of the equitable remedies were developed after the Strict Period, but two equitable remedies and those the two most important were developed and came into use in this period. They were specific performance and injunction. Injunction is a remedy to restrain the doing of some act, or to require the restoration of a former condition, where the remedy of damages is inadequate. Specific performance is a remedy to compel the fulfillment of a valid promise to do a certain thing, where the remedy of damages is inadequate, and the contract is free, fair, and capable of being presently executed.

Courts. All the courts of the Archaic Period continued thru the Strict Period. An interesting thing in connection

with the regular courts was the way they extended their jurisdiction. The Exchequer tried common pleas. It extended its jurisdiction thru the writ of *quo minas* "whereby he (a debtor of king) is the less able to satisfy us the debts which he owes us" because defendant owed the debtor (plaintiff). The King's Bench extended its jurisdiction so that it tried every kind of action except the old real actions by the bill of Middlesex and the writ of *latitat*. The King's Bench had the right to try cases of trespass, and after a defendant was in the hands of the marshal it proceeded to hear any complaint against him. If the defendant sued in trespass in Middlesex came into the hands of the officer, trespass was dropped and an action of debt brought. If the defendant did not live in Middlesex the sheriff returned that he was not found in his bailiwick and a writ of *latitat* was issued to the sheriff of the county where he lived to bring up the defendant, on the theory that he was a fugitive and had run away from Middlesex. Besides these three law courts, there was created in 1337 an appellate court, called Exchequer Chamber, from the common law side of the Exchequer. In 1585 this court was empowered to try appeals from the King's Bench. Before this it had heard appeals from the Common Pleas. The judges in this court were the barons and justices.

The Merchant Courts continued to develop the law merchant. The chief Maritime Court of the lord high admiral of England, who delegated his power to the judge of the Court of Admiralty, dates from Edward III. It had civil jurisdiction over contracts made at sea (but not charter parties made on land), seamen's wages earned at sea, and flotsam, jetsam, and salvage, but not of wreckage; and for a time it had criminal jurisdiction.

The Court of Chancery, which grew up in this period, has already been explained.

The judges of the assize were developed in the time of Edward I. Before this time the justices itinerant confined themselves to pleas of the crown and various real actions known as assizes, but after this they went on circuit by virtue of a royal commission of gaol delivery, *oyer et terminer*, assize, and *nisi prius*. The writ of *venire facias* had ordered the sheriff to summon a jury in a common law case to appear at Westminster. The statute of Westminster II, chapter 30, in-

served in the *venire facias* the words *nisi prius* (unless before) that day the justices appointed to take assizes shall come into his county. This is the origin of the expression that judges trying civil actions are "sitting at *nisi prius*".

Edward III set up the tribunal of the justice of the peace. Long before there had been in every county certain men, consisting of the sheriffs, king's constables, and bailiffs, and a few others, bound to preserve the peace. They had been called conservators of the peace. They could arrest disturbers and hold them in prison or bail them. Edward III added to the *ex officio* conservators men specially appointed by the crown. Their jurisdiction was soon extended. They were empowered to receive accusations and commit the accused awaiting the coming of the judges of the assize. Late in the reign of Edward III the keepers of the peace, now called justices of the peace, were empowered to take indictments and to bind people over to keep the peace, and to hear and determine at the king's suit all felonies and trespasses done in the county. From the very beginning of the office the Court of King's Bench assumed appellate jurisdiction by means of *certiorari* and *mandamus*, altho the first *mandamus* in the books directed to justices of the peace was in the reign of Edward IV. An act of Edward IV wholly denuded the Sheriff's Tourn of criminal jurisdiction and gave it to the justices of the peace sitting in Quarter Sessions, and the reason given was the corruption of the sheriffs.

In the time of Henry VII there was established another court known as the Star Chamber and for a time almost as important as the Court of Chancery. The Star Chamber was the "king in council". It, like the Court of Chancery, was carved out of the residual jurisdiction still left in the Council after the formation of the common law courts, and exercised over criminal matters a power analogous to that exercised by chancery over civil. Because of the corrupt practices of the sheriffs, and because of the difficulty of obtaining verdicts against such men as the Percys and Fenwicks in Northumberland, who kept armed desperate retainers in the courtroom, the Privy Council had been in the habit of interfering to prevent the perversion of justice; and finally in 1488 Henry VII procured the establishment of a regularly constituted court by an act of Parliament. The court was composed of the

chancellor, treasurer, keeper of the privy seal (or two of them), with a bishop and a temporal lord of the Privy Council, and the two chief justices of the King's Bench and Common Pleas (or two other justices in their absence), and it had authority to call before it and examine all those charged with any misbehavior and to punish them on conviction. It also exercised a certain amount of civil jurisdiction and admiralty jurisdiction by and against aliens and corporations. Its procedure was taken from the canon law. It was a law unto itself as to substantive law. At first it was essentially a court for the poor against the rich and powerful, but under the first two Stuarts it became a cruel political court for divines and king. The great complaint against it was its inquisitorial procedure. It was abolished in 1641 on account of its manifold abuses and the King's Bench took over its jurisdiction. Its procedure perished with it, but its work in reforming the old criminal law remained.

Somehow or other, in the Court of Star Chamber and the Court of Chancery, England stumbled onto a scheme for reconciling permanence with progress. Equity took its dominant substantive law ideas from the common law; imitated it where possible and departed from it to Roman law, etc., where common honesty required it; under the Tudors was not bound by precedents; and thus composed an appendix to and preserved the old private law. The Star Chamber in the same way supplied the deficiencies of the old mediaeval criminal law and thus preserved it. In this way the common law passed scatheless thru the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth. The Star Chamber and Chancery might have been dangerous to political liberties, yet but for them the old law would have utterly broken down for its badness, and might have been supplanted by the Roman law or no law but despotism.

During the reign of Henry VIII a great number of new courts were created, such as the Court of Augmentation for monasteries and abbey lands; the Court of Wards and Livery with jurisdiction over the king's wards and their estates; the Court of Requests, a court of equity for poor suitors; the Court of the Marches of Wales; and the High Court of Delegates with appellate jurisdiction over the Ecclesiastical Courts; and in Elizabeth's reign was established a Court of High Com-

mission for the trial of heretics; but today these courts have little but antiquarian interest.

Legal Procedure. Under Edward I the practice arose of putting all indictments in writing, and Edward III required the indictment to state specifically the acts which were going to be alleged as criminal, from which uncertainty in an indictment has remained a fatal error to this day. Written pleadings were introduced in the common law courts in the reign of Henry VIII. There was a gradual differentiation of pleading and practice from proof. The jury began to be judges of the fact and witnesses were employed in the sixteenth century. Rules of evidence began to form. The rules in regard to competency and disqualification, privilege and privileged communications, rule for attorneys, and compulsory attendance of witnesses came in during this period.

CHAPTER XII

PERIOD OF EQUITY

THE third period in the historical development of Anglo-American law began with the triumph of Lord Ellesmere, chancellor, over Lord Coke, chief justice of the King's Bench, in 1613-1616, and it continued thru the life of Lord Mansfield, who died in 1793, altho many characteristics of a fourth period began to manifest themselves as early as the publication of Blackstone's *Commentaries* in 1765. Thus the period lasted nearly two centuries, roughly the seventeenth and eighteenth centuries. This was a short period as compared with the Strict Period which lasted over three centuries (roughly the fourteenth, fifteenth, and sixteenth), and the Archaic Period which lasted over eight centuries (roughly fifth to thirteenth inclusive), but a long period as compared with the periods by which it was to be succeeded.

Characteristics. The end of the law in this period was the protection of morals. This social interest was more important than general security. The period marked a revulsion against the strictness and certainty of the Strict Period, and it was characterized by justice without formality. Duties were emphasized more than remedies. The social interest referred to was protected, for the most part, by a reform and development of the substantive law of legal capacities as found in the great subjects of crimes, torts, property, contracts, and public callings. It was also protected to some extent by new remedial rights developed by equity. But there was little or no protection by new courts and reforms in legal procedure, altho some brave attempts of this sort were made. The reforms and development of the law were carried forward by equity, legislation by Parliament, and some great common law judges at the head of whom stands Lord Mansfield.

Legislation. The Restoration was a date almost as important as the date of the quarrel between Coke and Ellesmere, for it promised a comprehensive legislative reform of the law, especially of legal procedure, but the people had become so tired of change and confusion that the promise was not fully realized. Some important reforms of substantive law

were instituted, but an elaborate attempt to reform legal procedure finally fizzled out, and the people laid aside their plans and returned to the institutions of their fathers. However, what was done was so good that the Stuart period has been called one of "good legislation and bad government". Another important date in the history of legislative reform is that of the Revolution of 1688. The Stuarts had claimed the divine right of kings to rule and that the people obtained their liberties from the king. The Commons fought this claim and on the Restoration forced a second grand charter from Charles II. The Revolution subordinated the Crown to Parliament and made the sovereign and his ministers anxious to comply with the wishes of the nation. In choosing William and Mary the people revived the Anglo-Saxon custom of choosing the king, and gave a death blow to the notion of a "personal monarchy", altho George III revived it for a time. They got a third great charter, and the Commons got control of the purse and the sword. The right to reject bills has never been exercised in England since Anne, who refused to assent to the Scotch Militia Bill in 1707. Direct legislation then became a normal means of altering the law.

Great Lawyers. Altho most of the common law lawyers had the same attitude in this period which they had had in the Strict Period, there were a few notable exceptions of men who were imbued with the spirit of equity and who struck some great strokes for reform. Sir Matthew Hale laid the foundations for the law of public callings. Lord Holt substituted the Roman law of bailments for the English law of bailments. Erskine introduced some reforms into criminal law. Jeremy Bentham, the father of the legislative reform movement, began his great work in this period. Lord Mansfield alone worked great changes in the law of practice, commercial law, and contracts.

Triumph of Equity. The reign of James I marks an era in the history of the Chancery Court. From Edward III to Henry VII all the chancellors had been ecclesiastics. Henry VIII appointed a lawyer, Sir Thomas More, who made a great reputation in the office. Following More came churchmen, politicians, and lawyers promiscuously, until Ellesmere, since when all the chancellors have been lawyers, including such great men as Cowper, Harcourt, King, Talbot, Hardwicke, Nottingham, Campen, Thurlow, and Loughborough. Elles-

mere, saturated with common law notions, began—whether for better or worse—to reduce the chancery rules of procedure to a system as technical as that of the common law, and in matters of substance to follow precedent as common law judges did. This practice was continued under Lord Nottingham and completed by Lord Eldon in the nineteenth century, when equity became as rigid and technical as the common law. Meanwhile equity continued the work it had begun under the Tudors, and Lord Ellesmere was largely responsible for its triumph. Ellesmere granted an injunction ordering a plaintiff in Coke's court, who had obtained a judgment by the trick of enticing defendant's witnesses into a beer-house while the action was being tried, not to proceed with his judgment. Coke advised plaintiff's attorney to prosecute defendant and his counsel under a statute forbidding the impeachment of the judgments of the King's Court in another court; and Coke also tried to persuade a grand jury to indict them. The grand jury refused to expose themselves to the indignation of Ellesmere. Then Coke announced that he would refuse to hear any counsel who had presented such a bill in equity. Ellesmere appealed to the king. The king consulted with Bacon, a life-long enemy of Coke, and other lawyers. They favored Ellesmere because they said the statute Coke invoked referred to foreign courts and because of a practice of sixty years in favor of such injunctions, and the king adopted their opinion. Henceforth there was no question of the supremacy of equity over the common law, and before the end of this period the chancellors above referred to introduced many new principles into Anglo-American law.

Criminal Law. Some reform of criminal procedure in cases of treason was brought to pass, but little change in the substantive law of treason occurred. The judges twisted the Statute of Treason (Edward III) so that those were found guilty of imagining the king's death who agitated in favor of a new Parliament and who pulled down a number of dissenting meeting-houses. As a result of the latter decision the Riot Act was passed in 1714 making the assemblage of twelve persons riotously in a public place an unlawful assemblage, and if they refused to disperse within one hour after the reading to them "of the Riot Act" they were guilty of felony without benefit of clergy.

Seditious libel came into prominence in the time of James

I, and became odious under the iniquitous judges Scroggs and Jeffreys. Scroggs held that to publish any news at all was unlawful, and Jeffreys held that gossipy letters containing the political rumors of the day were libelous. Elliott and others were imprisoned for speeches in Parliament. Prosecutions continued to be frequent until towards the end of the eighteenth century. The common law judges held that the only function of the jury was to find whether or not the prisoner published the words and that they referred to the persons they were said to refer to; and that whether they were criminal or not was for the court. They held that truth was no defense. Even Lord Mansfield did nothing to reform the law of sedition. But a practitioner by the name of Erskine, a barrister of great eloquence, came to the defense of a great number of those who were being prosecuted, and it was largely because of his efforts that the law was reformed. He contended for the right of a jury to bring in a general verdict, and insisted that criminal intent makes the crime, and that criminal intent was a matter of fact and therefore for the jury. He did not convince the judges, but he did convince the country and Parliament, and as a result there was enacted in 1792 Fox's Libel Act, which established the principle for which Erskine had been contending and changed the rule which had been laid down by the King's Bench for a hundred years. However, truth was not made a defense until 1843.

In 1677 an act was passed abolishing punishment of death for heresy. From the time of Henry IV sheriffs had been obliged to burn heretics turned over to them by Ecclesiastical Courts, but after this statute heresy could be punished only by ecclesiastical punishments.

During this period and long prior thereto there had been a great many capital crimes, but in practice executions had been rare except for treason, homicide, and other grave offenses. This was largely due to the fact that many offenders obtained the "benefit of clergy" in other cases than treason by showing that they could read or write their names and thus escaped the jurisdiction of the King's Bench. But in 1691 and succeeding years the benefit of clergy was taken away in one case after another so that the criminal law became very severe and harsh. One of the worst features of the criminal law was that a person convicted of a felony, without benefit

of clergy, was liable to forfeiture and attainder as well as capital punishment, and this feature of the criminal law was not remedied at all until 1813 and then not as to prisoners convicted of treason or murder.

Real Property. The law of real property, developed in the Archaic Period and made more strict and certain in the Strict Period, finally became almost unbearable. The burdens of tenure in chivalry were severely felt, and the plight of the king's wards was especially unfortunate. We have already explained how equity undertook to modify the law of real property by the introduction of uses and new forms of conveyance and how the attempt by the common law lawyers to defeat this undertaking by the Statute of Uses was defeated by their own holding that the statute did not apply to a use on a use. This was the opportunity for the Court of Chancery, and within one hundred years after the passage of the Statute of Uses it was enforcing uses as extensively as it had before the statute, only now the uses enforced by equity were known as trusts to distinguish them from the first use executed by the statute. A great many other reforms of real property law were introduced in this period, most of them by means of legislation. One of the most important things done in the first year of the restoration of Charles II was the destruction of feudal land law by a statute passed in 1660 abolishing all military tenures except grand serjeantry, and making the king's revenue thereafter come from taxation. By this reform the only incidents of tenure left were rents, reliefs, and escheats, and if there was no rent there was no relief. Homage had become obsolete. Aids had been abolished. Fines went with *quia emptores*. Wardship and marriage never applied to socage tenure. The Court of Wards and Liveries was also abolished. The celebrated Statute of Frauds, passed in 1677, had provisions requiring all wills of land to be in writing, signed by the testator and witnessed by witnesses in his presence; conveyances of freeholds by delivery of seisin to be evidenced by a document, signed by the feoffer or an agent authorized in writing; and all leases to be in writing except those not exceeding three years. In the time of Queen Anne registries of title were established in Yorkshire and Middlesex, not of actual ownership but of transactions affecting title. Something of this sort seemed

to be needed, since the Statute of Enrollments of bargain and sale deeds had been avoided by the deed of lease and release, but the scheme did not prove a success. In the time of George II the Statute of *Mortmain* was modified so as to permit gifts *inter vivos* and check deathbed donations to corporations, and a statute was passed giving a landlord the power to sell goods distrained for rent. Otherwise the law of real property remained as it had been codified by Lord Coke.

Personal Property. In 1670 was passed the Statute of Distributions, said to have been drafted by Edward Hyde, Earl of Clarendon, for the administration of personalty in case of intestacy, and this statute has been the basis for the distribution of personalty in Anglo-American law ever since. In 1623 was passed the Statute of Monopolies making void all existing monopolies and patents except those granted to the first inventor of some new manufacture to be used within the kingdom, and they were cut down to twenty-one years, and as to the future were to be given for fourteen years or under. This act is the foundation of the present patent laws of the world. In 1709 was passed a Copyright Act. In the seventeenth century the right to the exclusive publication and printing of a book had been recognized as a common law right, but it had proven practically worthless because of difficulty of proving damage and because defendants were liable to be paupers. The Copyright Act abrogated the common law, required record of title, gave the author the exclusive right of publication for fourteen years after 1710, with a right to renew for another fourteen years, and gave the power to certain dignitaries to regulate the price if unreasonable. This act was repealed in 1842, but was amended and revived again in 1911.

Contracts. The law of contracts continued to develop thruout this period. Bilateral agreements were enforced thru special *assumpsit* in the seventeenth century as unilateral had been enforced in the sixteenth; and the *quantum* counts were developed thru general *assumpsit* in the seventeenth century as the *indebitatus* counts had been developed in the sixteenth century. Lord Mansfield laid the foundation for the law of implied conditions,³³ and developed whatever notions of moral

³³ *Kingston v. Preston*, 2 Doug. 689.

consideration are found in Anglo-American law. Equity introduced into contracts the law of assignability of rights by specifically enforcing a covenant not to revoke a power of attorney given the assignee. The Statute of Frauds already referred to had a number of provisions covering contracts, in certain cases requiring writing, signed by the party to be charged, and in one case (sales) requiring either writing, or receipt and acceptance of part of the goods, or part payment. Lord Mansfield also in this period incorporated into the law of England the law merchant, with its important topics of insurance and negotiable instruments, and further developed their principles; but their development continued into the nineteenth century, and for this reason the United States contributed something to the Anglo-American law of the subjects. Equity also, by intervening in cases of fraud, mistake, accident, etc., developed the voidability of contracts for various vitiating circumstances. In 1710 an act was passed making void securities given for money lost in gambling.

Mortgages. At about the beginning of the fifteenth century the modern form of mortgage in the form of a conveyance in fee upon condition, title to revert to the mortgagor in case of payment but to become absolute in case of nonpayment on the due day, became the regular form of mortgage. The law courts construed the condition literally, so that the mortgagor not only lost his property but still owed his debt. Equity began to relieve from forfeiture where there had been an accident, and later mere negligence, and finally wherever there was a penalty. This was the case in the common law mortgage. The right of the mortgagor to redeem in equity was established by the time of James I. Equity regarded the mortgagor as the true owner, and the mortgagee as holding the title as security. The development of this doctrine resulted in making mortgages a branch of equity. The modern lien theory of mortgages is really the adoption at law of the equity view of mortgages.

Agency. Liability of principal and master in the law of agency continued upon the basis of commanded acts until 1689, and thereafter on to the nineteenth century upon the basis of a presumption of a command.³⁴

³⁴ *Turberville v. Stampe, Comb*: 459.

Bailments. The law of bailments, with the exception of innkeepers and common carriers, was largely, because of the work and influence of Lord Holt, removed from the foundation of absolute liability of bailees to that of liability for negligence only.³⁵

Public Callings. The law of public callings dates from this period, and no one else is entitled to so much credit as Lord Hale for its origin.³⁶ He suggested a test for determining a public calling, and laid down some if not all the fundamental obligations which today are imposed by law upon those engaged in public callings, to wit, to serve everybody of the class of service, with reasonably adequate facilities, for reasonable compensation, and without discrimination. In this period the number of public callings became many, and included not only innkeepers and common carriers but many other trades, professions, and businesses, some of which are no longer classed as such.

Torts. In this period there developed the new torts of malicious prosecution, alienation of affections, and unauthorized printing of unpublished works; and the tort of deceit was revived.

Political Privileges. The Corporation Act (1661) excluded from office all but Church of Englanders. The Fourth Act of Uniformity (1662) established the *Book of Common Prayers*. Puritan doctrines were forbidden. The Test Act (1673) excluded Catholics from office and thereby broke up the Cabal.

Remedies. The equitable remedies of specific performance and injunction which had come into use in the Strict Period flourished in the Period of Equity, and in addition equity invented the following new remedies: interpleader, reformation, cancellation and rescission, assignment of dower, establishment of boundaries, partition of land and chattels, bills of peace; bills *quia timet* (to which have been added in modern times the statutory suit to quiet title and the suit to remove cloud on title), redemption, foreclosure, marshalling securities, creditors' suits, appointment of receivers, partnership bills, contribution, exoneration, subrogation, and relief against actions and judgments, besides discovery and accounting which

³⁵ *Coggs v. Bernard*, 2Ld. Ray. 909.

³⁶ *Allnutt v. Ingles*, 12 East 527.

had been invented in the Strict Period. There was practically no development in common law remedies, except that general *assumpsit* became available for implied promises and special *assumpsit* for bilateral agreements, and case was still further extended to furnish remedies for two or three new torts.

Courts. This period was marked, not by the creation of new courts, but by the abolition of old. The Court of Star Chamber was abolished in 1641, and the High Commission Court and some of the courts established in the reign of Henry VIII soon followed it into oblivion. These courts had become instruments of oppression and injustice, and their abolition was one of the chief accomplishments of the Period of Equity.

Legal Procedure. Because of evasions of Magna Charta and the writ of *habeas corpus*, a new *Habeas Corpus* Act was passed in 1679, making it a crime to imprison a person in Scotland or beyond the seas (where he could not be found and a writ would not lie), providing for bail, for application for writ in vacation to chancellor or any judge, and for punishment of gaolor for violation of the writ, and providing that if a person was not brought to trial at the next sitting he was to be given his liberty (with certain exceptions) and not again imprisoned. Because of the especial harshness of criminal procedure in cases of treason there was passed in the reign of William and Mary (1695) an act which gave the accused the right to a copy of the indictment five days before trial, a copy of the panel of jurors two days before trial, the right to take advice and make his defense by counsel, the right to have his witnesses examined on oath, the right to have the two witnesses (already required) testify to the same overt act of treason, or to different acts of the same treason, and the right in the trial of a peer or peeress to have summons sent to every peer. Some development in the law of evidence occurred in this period. In this period were developed the parol evidence rule, the character rule, the best evidence rule, the privilege against self-crimination, and the rule as to two witnesses in treason. Cross-examination took the place of torture, altho I suppose the witnesses thought that cross-examination was only another form of torture. An act was passed in 1697-1698 making reference to arbitration a rule of court.

The evolution of the jury became complete in this period. Jurors entirely ceased to be witnesses and became judges of the facts. New trials were granted in 1655. The rules as to the measure of damages began to be formulated in the eighteenth century. The independence of the jury was established in *Bushell's Case* (1670) when Justice Vaughan set at liberty a juror who had helped to acquit the Quakers Penn and Mead. The Star Chamber had admonished and fined and imprisoned for returning verdicts contrary to the direction of the court. The chief justice of the King's Bench had continued this practice. But the above decision of Justice Vaughan ended the practice.

By an act of 1731 all pleadings in common law actions were required to be in English. Thus was terminated the practice begun upon the establishment of the Curia Regis by William I of having all pleadings in a curious language called, by courtesy, French.

The reports which cover the common law cases of this time are the *Year Books*, which cover the period from 1292 to 1537; the casual private reports, which cover the period from 1537 to 1785; and the regular term reports which began with 1785. The chancery reports began to improve. Text-books of equity began to appear.

In general little improvement was made in common law legal procedure, and the procedure in chancery became noted for its delays. Reforms were demanded, but few were made. The social interest in general morals had to be protected by antecedent rights and remedial rights rather than by a legal procedure adapted to that end. The extraordinary courts of the Tudors were overthrown; the Ecclesiastical Courts were reduced to dignified impotence; the House of Lords was prevented by the Commons from trying cases as a court of original jurisdiction; the Court of Chancery answered to the needs of the subject; and with this the people were willing to endure for a longer time the barbarities of common law procedure.

United States. While United States history began in the Period of Equity, there has never been any such period in the history of legal development in this country. Legal history here begins with the Period of Maturity, which we shall consider next. In New England in the seventeenth and the first

of the eighteenth centuries law was a combination of Hebrew law and popular law. After the Revolution the United States, as states, adopted as our common law the common law of England so far as adapted to conditions here, the canon law so far as adopted by the Ecclesiastical Courts in probate and divorce cases and English statutes, either as of the date of 1776 or as of the date of 1607; but it was too late to apply this law during the time which had already passed, and when they did come to apply English law they worshiped so blindly at the shrine of Blackstone, whose *Commentaries* had been published a short time before and in the law offices were largely substituted for other law books which practitioners did not possess, that they entered at once upon the Period of Maturity rather than the Period of Equity. But since equity and admiralty law had not reached their final form in England, the United States, thru the work of Chancellor Kent and Justice Story, contributed something in the nineteenth century to the Anglo-American law of these subjects.

CHAPTER XIII

PERIOD OF MATURITY

THE Period of Maturity began about 1793, the year of the death of Lord Mansfield, and lasted until about 1875, the date of the passage of the Judicature Acts in England. This makes the Period of Maturity a comparatively short period of less than one hundred years.

Characteristics. The end of the law in this period was the protection of property and freedom of contract. The social interests protected were the social interests in security and equality of opportunity. The emphasis now was upon rights, instead of upon duties as the emphasis had been in the Period of Equity. The social philosophy and economic theories of the last quarter of the eighteenth century were adopted by the courts. Men were thought to be endowed with certain "natural rights". Liberty was associated with equality of opportunity, and it was thought that once political restrictions and restraints upon liberty were cleared away nothing more would be needed. Government was regarded a necessary evil, and the less of it the better. The theories of competition, *laissez faire*, and individualism of Rousseau and Adam Smith were in reality for this period at least made a part of the common law. The period marked a revulsion against the Period of Equity, as that period had marked a revulsion against the Strict Period, and it is characterized by many of the things which characterized the Strict Period.

Our Declaration of Independence and our bills of rights are documents of the Period of Maturity and embody the philosophy and economic theories of the period.

The social interests above named were protected on the one hand by a reduction of the law to greater certainty and strictness, as in the Strict Period; and on the other hand by antecedent rights of contract, instead of by those created by the law without contract. What was wanted in this period was not more law, but less doubt about the law, and more freedom for individuals to make their own law. What development in the law occurred was consequently mostly in the realm of antecedent rights rather than in the realm of remedies or adjective law.

Yet thruout this period other forces were at work, and tho they did not accomplish much in this period, in the way of reform, their reforms flowered in the next Period of Socialization of the law. Bentham had been commenting, first, on the want of system and certainty in the law; and, second, on the extraordinary harshness of the penal laws; and in 1827 Parliament entered upon the work of law reform. Henry Brougham, afterwards lord chancellor, a devout Benthamite, delivered in 1827 in the House of Commons a long and brilliant speech on the laws of England.

He dwelt on the necessity of codification, especially of the criminal law; on the absurdity of fines and recoveries; on the complexity of the methods of conveying land; on the cumbersome process of the common law courts; on the extraordinary technicality of writs and pleadings; on the fictions which had to be resorted to; and on the harshness of the penal laws.

The result of his speech was the appointment of commissions, which made valuable reports and laid the foundation for further investigations, upon which legislative reforms dating from 1833 to 1873 were based.

Equity. Lord Eldon, in the early part of this period, completed the work begun by Lord Nottingham, and reduced equity to a system as fixed as the common law. After the time of Lord Eldon the doctrines of equity remained intact except for a few statutory modifications chiefly in the direction of protecting trustees.

Public Callings. The law of public callings was distinctly contrary to the purpose of the law in the Period of Maturity, and while it was not entirely abolished it received important limitations. No new callings were added to the list of public callings, but some of the old callings were taken from the list, and those callings left on the list of public callings were permitted to fix their obligations by contract to a large extent instead of having them fixed by law. In this way common carriers were permitted to carry under a contract liability as well as a common law liability, to exempt themselves from all liability except for negligence, to limit the amount recoverable in case of loss (in most jurisdictions in case of loss due to negligence), and to exempt themselves from all liability to a free passenger.

Criminal Law. Various consolidation acts were passed in this period. The nearest approach to a criminal code in Eng-

land was the Criminal Law Consolidation Acts of 1861, but even these left most of the old common law definitions untouched. Treason was cut down to offenses against the persons of the sovereign. Criminal defamatory libel was modified by Lord Campbell's Act of 1843, which made truth a defense. Some of the states of the Union have abolished common law crimes, and most of them have adopted penal codes, which for the most part are mere codifications of the common law. The federal government has no common law crimes.

Real Property. The Fines and Recoveries Act of 1833 substituted simple disentailing assurances for collusive suits. The Prescription Act of 1832 substituted brief periods for time immemorial in case of profits and easements, and the Limitation Act of 1833 vested title after twenty years from the time claims became vested. By the Dower Act of 1833 the wife became entitled to dower out of equitable as well as legal estates, but only in lands to which the husband was entitled at death and of which he died intestate. The Inheritance Act of 1833 permitted the ancestor and relatives of the half-blood to inherit. The Real Property Act of 1845 practically abolished feoffment by livery, almost obsolete for two centuries, and substituted for it a deed of grant. The Wills Act of 1857 required all wills to be in writing, those relating to personalty as well as those relating to land, and provided that all wills should speak as from the testator's death, so as to include all property of which he died possessed.

Corporations. In 1844 companies were allowed to obtain a certificate of incorporation without applying to Parliament for a charter, and an act of 1855 permitted registry with limited liability of members. In the United States, New York passed the first general religious incorporation act in 1784. This privilege was extended to manufacturers and bankers in 1811, and made a general policy in 1850. In England, railway companies still require an act of Parliament for their creation.

Agency. The law of representation developed so as to make the principal liable for the acts of the agent within the scope of his authority, and the master liable for the acts of the servant within the course of his employment.

Sales. The law of sales is largely a development of this period, and the great problem for the courts was to determine when facts constituted a sale and when only a contract to sell, that is, when the title would pass. Was the ascertainment of the price a condition precedent? At first the English courts held that title could be transferred only by delivery and payment. Then they adopted the reciprocal grant doctrine, whereby they held that title might pass without delivery and payment if credit was given. Finally they held that title would pass according to the intention of the parties, whether or not credit was given (which shows the influence of the theories of individualism and liberty of the time). But suppose something remained to be done to ascertain the price, did that indicate an intention not to have the title pass? In the case of *Hanson v. Meyer*,³⁷ this was at first answered in the affirmative as an absolute rule. Later, in the case of *Turley v. Bates*,³⁸ this was qualified by confining the rule to an unascertained price to be fixed by the seller, and the English Sales of Goods Act so fixed the law. In the United States some courts followed *Hanson v. Meyer* and some *Turley v. Bates*, and some did away with the presumption of retention of title because something remained to be done to ascertain the price.

Where something other than the ascertainment of the price remained to be done to the goods by the seller to put them in deliverable shape, all courts were agreed that the title would not pass until such thing was done. But would the title pass at once in the sale of a specified quantity from a larger uniform mass? The English courts in the case of *Whitehouse v. Frost*³⁹ at first answered, Yes; but this case was overruled by later cases, in spite of the fact that the same courts recognized tenancy in common in the case of confusion of goods. A New York court held in the case of *Kimberly v. Patchin*⁴⁰ that the title would pass if the parties so intended, and this became the prevailing doctrine in the United States. At first it was doubted that the parties would be tenants in common, but later it was held that they were tenants in common with the right of severance in the case of

³⁷ 6 East 614 (1808).

³⁸ 2 H. and C. 200 (1863).

³⁹ 12 East 614 (1810).

⁴⁰ 19 N.Y. 330 (1859).

fungible goods. Where there was a sale of goods having a so-called potential existence, would the title pass when the goods came into existence, freed from any defects of title due to rights which had accrued since the time of the original bargain? In *Grantham v. Hawley*,⁴¹ the English courts answered, Yes. This rule was later limited to crops and the young of animals and still later was abolished in England by the Sales of Goods Act. In the United States the doctrine was narrowed so as not to apply to crops to be grown beyond the next season, until the United States Sales Act, which followed the English in this respect. Yet in the Period of Socialization it has been held that, where specific performance would lie or a mortgage has been given and damages would be an inadequate remedy for a breach of a promise to give security, tho the doctrine of potential existence has been abolished and the contract is turned into a contract to sell, such contract may have equitable effect in the nature of a lien upon the goods as they come into existence except against *bona fide* third parties.

Suppose the sale was for cash, would title pass? The early law of the period held that title would not pass. Payment or credit was required. But later there arose a presumption that there was an absolute sale but that the seller had a lien in lieu of title.

Contracts. In spite of the emphasis upon freedom of contract, not many changes in the law of contracts were made in this period. Among the few which were made may be mentioned the rule which permitted a contract to be discharged by an accord, at first (in 1831) in the case of composition, and later in all cases if it was the intention of the parties to take the accord in satisfaction; and the rule which permitted a third party beneficiary to sue on a contract made either for his sole benefit (donee) or where the promisee was under existing liability to him (payment). In the case of third party beneficiaries the courts got themselves into hopeless conflict. All agreed upon insurance cases. England, after first deciding in favor of other donee beneficiaries, later decided against them. In the United States some courts favored donee beneficiaries; others payment beneficiaries; but most, both classes of beneficiaries.

⁴¹ *Hob.* 132 (1616).

Torts. The law of torts was not in this period notable for new torts created, but for the recognition of a theory of torts in place of a theory of trespass, and for the development of specific doctrines. The recognition of torts as a possible body of principles governing liability for acts which injure others was brought to pass by law writers upon the subject. The first book on torts was a United States work, *Hilliard on Torts*, which appeared in 1859. The first English book on torts was *Addison on Torts*, which appeared the next year. Another pioneer in this field was Bishop. Among the new doctrines to be developed in this period were the doctrines of proximate cause, assumption of risk, contributory negligence, the ordinary prudent man, and of no liability without fault. An ethical standard of reasonable conduct replaced the unmoral standard of acting at one's peril.

Remedies. There was no development in the law of remedies, worthy of mention, in this period, except that with reference to the remedy of damages, the functions of court and jury were further defined. By the end of the eighteenth century the matter of damages had become so much a judicial question that the jury had little function to perform in contract cases. In the present period the jury was shorn of its power in all cases of pecuniary injuries, so that it was left in power only in cases of non-pecuniary injuries and exemplary damages, and even then under the direction of the court. The period, however, was characterized by greater strictness and technicality in the application of remedies.

Courts. There was some change in this period in the judicial system of England, altho the great changes did not come until the next and last period. Separate Welsh courts were suppressed in 1830. A vice-chancellor, in addition to the chancellor and the master of the rolls, was appointed in 1813. Two more vice-chancellors were appointed in 1841, when the equity side of the Exchequer was suppressed. An intermediate court of appeal from chancery was created in 1851. A Bankruptcy Court was established in 1837, 1869. A Court of Probate, and a Court of Divorce and Matrimonial Causes took over the jurisdiction of the Ecclesiastical Courts in 1857. After these changes, appeals lay from the Queen's Bench, Common Pleas, and Exchequer to the Exchequer Chamber (composed of all of the common law judges except

those who heard the case in the first instance) and then to the House of Lords; from Chancery (one court) to the Lords Justice of Appeal, thence to the House of Lords; from Admiralty and Ecclesiastical Courts to the Judicial Committee of the Privy Council, which succeeded the Court of Delegates; and from the Court of Probate, and the Court of Divorce and Matrimonial Causes to the House of Lords. The judicial system which grew up in the states of the United States in this period consisted of the courts of the justices of the peace, courts of police magistrates, municipal courts, district (circuit, or superior) courts, appellate courts, and supreme courts; to which was added in the next period juvenile courts. The federal system consisted of circuit courts (now district), circuit courts of appeal, and the United States Supreme Court, with a court of claims, courts for the District of Columbia, Patent Office, Treasury Department (Comptroller), and territorial courts.

Legal Procedure. One of the blackest spots in the pre-Benthamite period was the way prisoners were treated on trial. Before the revolution of 1688, a man accused of treason or felony did not have the privilege of counsel (altho he had this privilege in cases of misdemeanor, where conviction did not entail loss of life and property), and the behavior of judges and prosecuting counsel (especially in cases of treason and sedition) was frequently most brutal. Brutality ceased after 1688, counsel was allowed in treason cases after 1747, and finally in 1836 the same privilege was extended to persons accused of felony. In 1833, 1843, and 1851 Bentham's views in regard to the rules of evidence, that they were for the discovery of truth rather than to hide it, so far prevailed as to make everyone competent witnesses except persons accused of crime or their husbands or wives. Further reforms of procedure in the common law courts were instituted in 1852, 1854, and 1860, but since these were absorbed and enlarged by the Judicature Acts of 1873 and 1875, no further discussion of them will be given, except to say that for one thing all real actions were abolished. Wager of law was abolished in 1833. Wager of battle was abolished in 1819. Benefit of clergy was abolished in 1827. Summons and warrant were authorized in 1848. A police was established: metropolitan in 1829, borough in 1836, and county in 1839 and 1856. The

court assumed further control over the jury in the matter of the measure of damages in tort actions.

In the United States the work of reform of legal procedure is found in what is called the Field Code of 1848, which has been generally adopted by the states of the Union. Since that time practically nothing in the way of reform has been done in the United States. Criminal procedure is still that of days of the Stuarts. The disqualifications of witnesses have been largely abolished, but a preliminary examination of jurors for bias is tolerated, and the position of state judges in trials is not much more than that of bailiffs. Courts in the United States have the power to declare statutes void.

The above reforms, while considerable, were not thoroughgoing. In the United States, for example, it is questionable if the legal procedure is any better under the codes than it was under common law procedure. However, there were rumblings which portended the storm of legal reform which was to break in England in 1873, and which will probably break in the United States within a few years from the time this is written.

CHAPTER XIV

PERIOD OF SOCIALIZATION

THE Period of Socialization began in England about 1875, the date when the Judicature Acts went into operation, and it has not yet ended. In the United States, while many of the characteristics of the Period of Socialization have been manifesting themselves for the last fifty years, it is doubtful whether or not they have even yet become sufficiently paramount to give character to the period. Yet no effort will be made to separate United States from English legal history for purposes of classification of historical development. Enough happened in England in 1875 so that it is accurate to say that the Period of Socialization in Anglo-American legal history began about that date.

Characteristics. This period marks a revulsion against the Period of Maturity—with a concept of liberty whose only outcome would have been anarchy, as the Period of Maturity had marked a revulsion against the Period of Equity, and as the Period of Equity had marked a revulsion against the Strict Period. Thus we see how the legal pendulum has swung back and forth thru the centuries. After it had swung over to one extreme in the Strict Period, it swung to the opposite extreme in the Period of Equity. Then it swung back towards the Strict Period in the Period of Maturity. Following this it swung again toward the Period of Equity in the Period of Socialization. Consequently, the Strict Period and the Period of Maturity have points of similarity, and the Period of Equity and the Period of Socialization resemble each other.

The end of the law in the Period of Socialization is the satisfaction of as many human wants as possible. It is tending in the direction of making legal justice social justice. It is endeavoring to give fair play between groups as well as between individuals. The chief characteristic of the law in this period is the emphasis upon social interests. The natural result of the overemphasis of rights in the Period of Maturity was to raise the question of why people had rights. The explanation that they were natural and God-given was exploded by the discovery that the only natural rights which men had were the actual rights which Englishmen had obtained for

themselves. Then it was discovered that the reason why men had rights was in order to protect certain social interests. Men saw that the historical order was not the natural order. The historical order has been, first, courts and legal procedure; second, remedies; third, duties; fourth, rights; and fifth, social interests. The natural order is, first, social interests; second, rights; third, duties; fourth, remedies; and fifth, courts and legal procedure (legal redress). Individuals have rights and duties because only thus, under the legal scheme, can social interests be protected. Remedies are given for the purpose of making rights and duties effective. Legal redress thru the machinery of the courts and legal procedure is the means whereby remedies are carried out. When this was discovered people also discovered that unless rights, duties, remedies, and legal redress are furthering some social interest there is no good reason for their existence; that if one social interest is more important than another, the one of less importance in case of conflict must yield to the one of more importance; and that there are other social interests just as important as those which had been emphasized up to the last of the nineteenth century. The result was that there has been great development of social interests in this fifth and last period in the historical development of Anglo-American law. Not only the social interest in general security, including the interests of personality, domestic relations, and substance, but the social interests in the security of social institutions, in general morals, in the conservation of social resources, in general progress, and in the individual life have been recognized and protected by the same scheme of social control by which the earlier social interest in general security was protected.

This development in the law has given us a new jurisprudence called sociological jurisprudence. Some of the chief exponents of this are von Jhering in Germany, Leon Duguit in France, and Roscoe Pound in the United States. These men have correctly interpreted the Period of Socialization, if they have not positively given direction to some of its movements. Thus there is observed in the twentieth century the same relation between law and philosophy and economics which existed in the nineteenth century, but it would be difficult to tell which has changed more, the law, or philosophies and economic theories.

International Law. An interesting manifestation of the socialization of the law is the development of law in the international field. There are international social interests even more paramount than national social interests. The social interest in peace on the high seas and between the people of the nations is certainly greater than the social interest in peace on land and between people as individuals. There are other paramount international social interests, like international commerce, freedom of the seas, disarmament, and the prevention of the rebarbarization of the world. Judging from past legal history it would seem that the way to protect such social interests would be to substitute law for force by the formation of an international government—a federation of nations—with jurisdiction over such international social interests; which would first recognize the international social interests to be protected, and then protect them by the recognition of international rights and duties (like disarmament and outlawry of war) and by some scheme of international legal redress, as by a world court. But it looks as tho in international affairs, as in national affairs, people would not follow the logical order but the practical order, and instead of learning anything from the past would follow the slow method of the past. If that is done, the first step will be an attempt to regulate international vengeance and self-help (war) and afterwards to abolish it, but even when the world is ready to abolish war and substitute law therefor it probably will begin, not with international social interests, but with courts and legal procedure, then remedies, then rights and duties, and finally social interests. The regulation of war by treaties, the League of Nations, and the World Court indicate that the old legal historical order is going to be followed in international affairs, but they also indicate that some day there is a possibility for the law to reign in international affairs as supremely as it now reigns in national.

The social interests of the Period of Socialization are protected for the most part by a new and reformed system of courts and legal procedure, but they also receive some protection by the creation of new legal capacities and liabilities and an extension of the old remedies to meet the new situations. For example, rights and privileges of property which were upheld in the nineteenth century will not be tolerated

today; as shown by the fact that a spite fence is no longer legal; by the fact that many limitations are put upon property in the exercise of the police power, the power of taxation, and the power of eminent domain; by the fact that the husband must have his wife join in a conveyance of realty; by the fact of the limitations placed upon creditors and other injured parties by exemption laws and bankruptcy laws; and by the fact that things formerly classed as *res communis* and *res nullius* are now classed as *res publicae*. Freedom of contract is no longer limiting, but is being limited by the law of insurance, and the law of public callings, and by the rules of illegality. Liability is being imposed without fault upon the master, or employer, in workmen's compensation laws, upon the owner in case of dangerous instrumentalities, and upon the head of the family in case of the family automobile. There is a social interest in holding no one liable without fault, but in modern times there are other social interests which sometimes overbalance that social interest, and then absolute liability is better than no liability without fault. Taxation laws, especially income and inheritance tax laws, are now based upon the principle of ability to pay.

Real Property. Remarkable changes in real property law have occurred in England. Permissive waste was abolished in England in 1889 thru the action of the equity courts.⁴² In 1891 equity also abolished ameliorating waste.⁴³ Ameliorating waste has never been recognized in the United States. The Settled Land Act of 1882 enabled a life tenant and a tenant in tail to convey a fee simple, so that others interested would have only a trust in the proceeds. The Registry Acts of 1862 and 1875 provided the machinery for registration, but it did not work well. But the great changes came with the Consolidating Acts of 1925 which went into operation in January, 1926. This was a code of real property law. The great purpose of this reform, a lawyers' reform, was to carry out the Benthamite belief in the free trade in land and break up the family settlements of England. The 1925 Acts went farther than the Acts of 1882 and gave the life tenant a fee simple, reserving to others interested only a trust in proceeds, and provided for trusts for sale. The Acts of 1925 re-

⁴² *In re Cartwright*, 41 Ch. D. 532.

⁴³ *Menx v. Cobley*, (1892) 2 Ch. 262.

pealed the Statute of Uses, the Statute of Distribution, and the Statute for Partition. But because of the lack of registry of legal and equitable titles the Acts made the legal estate of paramount importance for the sake of the purchaser. The Acts of 1925 simplified tenures; reduced estates to fee simples and estates for years, and abolished tenancies in common; kept most equities off the title; denied a fee to mortgagees; provided that settlements must be by way of trusts; and assimilated the devolution of real and personal property.

Many, including T. Cyprian Williams and Sir Arthur Underhill, desired to push the reforms further, and probably within a few years they will be pushed further. The legal profession in England agrees that the classic law of estates has outlived its usefulness, and the leaders believe that the law of property for the future must come out of the law of personal property. Real property must be assimilated to personal property. But how? One suggestion is to assimilate land to the chattel real. A compulsory registration of title (or perhaps of deeds) will also probably come in England within a short time after the ten years of inaction guaranteed.⁴⁴

Many of the problems which have been bothering the English do not bother the people of the United States. Land in the United States has always either been owned allodially or held under free and common socage tenure, so that we are not bothered by family land settlements. We do not find so much difficulty in assimilating real to personal property because we have assimilated personal property to real property. We have long had complete systems of registration. In the United States the law of waters has practically become the golden rule. Yet our real property law is not perfect. For the future we have the same problems which the English have, and shall probably solve them as the English will by obtaining a law of property out of the law of personal property.

Contracts. The development in the law of contracts in this period has been in connection with the topic of illegality, thru which means many things have been removed from the realm of contracts in order to protect other social interests. Illustrations of these things are agreements in restraint of trade, agreements to create a monopoly, agreements to relieve a com-

⁴⁴ Bordwell, "Property Reform in England", 11 *Iowa L. Rev.* 1.

mon carrier from liability for negligence, agreements to injure the public health, agreements to promote dereliction of public duty, lottery and wager agreements, etc. Most of these inhibitions are statutory, yet for the most part the law of contracts still remains case law. The American Law Institute is working upon a restatement of the law of contracts.

Bills and Notes. A Bills of Exchange Act was passed in England in 1882, and in the United States a Uniform Negotiable Instruments Act drafted by the Commissioners on Uniform State Laws has been enacted by practically all the states of the Union.

Sales. A Sales of Goods Act was enacted in England in 1893, and a similar Uniform Sales Act recommended by the Commissioners on Uniform State Laws has been widely adopted in the United States.

Public Callings. The law of public callings has again begun to grow. Not only have new callings, like insurance and housing in times of emergency, been put into the class of public callings, but freedom of contract in the realm of public callings has been largely abrogated for control and regulation by public commissions. A uniform bill of lading prescribed by the Interstate Commerce Commission has practically supplanted private contracts by railroads. Uniform bills of lading and uniform warehouse receipts acts have been adopted by Congress and by many state legislatures.

Persons. Married women, infants, and insane persons have either been emancipated or received greater protection than heretofore.

Torts. The new torts of procuring refusal to contract, procuring breach of contract, and privacy have appeared in this period. Workmen's Compensation laws and old age pension laws for laborers and the aged also have made their appearance. Absolute liability has also been imposed in case of dangerous instrumentalities and the family automobile. The American Law Institute is at work upon a restatement of the law of torts.

Constitutional Law. In the United States constitutional law has had and is having a tremendous growth. This is due to the fact of our written constitutions, our dual form of government, and to the fourteenth amendment to the United States Constitution. Under the fourteenth amendment espe-

cially the United States Supreme Court is determining and protecting social interests as perhaps no other tribunal in the world.

Courts. The socialization of the law has manifested itself in this period in England in the reform of the system of organization of the courts and in the reform of legal procedure as in no other way. By the Judicature Acts of 1873, 1875, 1876, and 1881, there was accomplished a reform of the judicial system of England and of the legal procedure in the common law courts, which had been needed as far back as the first part of the Period of Equity. Refusal to make this reform had been largely responsible for the rise of the Court of Chancery; this kind of reform had been attempted at the time of the Restoration and at subsequent times without success.

By the Judicature Acts all the superior courts were combined into one system called the Supreme Court of Judicature. This was divided into three branches: the High Court of Justice, the Court of Appeal, and the House of Lords and the Judicial Committee of the Privy Council (four paid members of Lords and four paid members of Judicial Committee). The High Court of Justice was in turn divided into three divisions: The King's Bench Division, the Chancery Division, and the Admiralty, Probate, and Divorce Division. Besides this great court there were established the County Courts, created in 1846 to take the place of the local courts which had died; the Assize Courts and the Central Criminal Court (London); and the Quarter Sessions of the Justices of the Peace. The County Courts were given jurisdiction over amounts not to exceed £50, allowed a jury of five, and given fifty-four circuits with fifty-four judges, and an appeal to the High Court was a matter of right where the amount was over £20. The judges of the King's Bench Division were required to do the work in the Central Criminal Court. The Quarter Sessions were divided into Petty Sessions and Police Court. The Court of Appeal was made to consist of the lord chancellor, the chief justice of England (King's Bench), the master of the rolls, and five lords justices of appeal, as ordinary members, and it was provided that any ex-lord chancellor might, if he was willing, sit as a member.

Legal Procedure. By the Judicature Acts there was created a new legal procedure compounded out of the best in com-

mon law and equity, but leaving all details to rules of court. Since the Judicature Acts, while there has been an assignment of subjects to the different divisions of the High Court of Justice, all matters are cognizable by any division of the court. This has resulted in the abolition of multiplicity of suits. In the matter of preparation of cases for trial, a plaintiff can in the same action claim both legal and equitable remedies, and can ask for the redress of all his grievances against the defendant; the defendant may counterclaim in the same suit any substantive cause of action which he has against the plaintiff; no injunction can be issued from one division to restrain proceedings in another; forms of action are abolished; technicalities of pleading have been abolished and in most commercial causes they are altogether dispensed with; and chancery proceedings have been shortened by the originating summons. In this way, not only are all differences between the parties settled, but they are frequently settled in a summary way without going to court; and even if they are taken to court the state, instead of private attorneys, exercises supervision over the way the case shall be presented. In the matter of the trial of cases, modern English legal procedure is characterized by nonpartisan control over all the proceedings by the judge. The state impanels the jury. The judge determines the issues, examines witnesses, sums up the case before the jury, and requires special verdicts. The accused, or husband or wife of accused, may testify. Parties may be witnesses. Oral evidence is preferred to affidavits. The defense is entitled to counsel. As a result there is little bickering over the rules of evidence. In the matter of review, appeals are conducted as rehearings, and the appellate court practically always renders final judgment. This has done away with new trials and reversals for technicalities. There was no appeal in criminal cases until 1907, when the Court of Criminal Appeal was established, but it grants no new trials. Perhaps the most admirable of all the reforms introduced into English legal procedure is the making the rules for the most part rules of court. The consequence of this is that the rules are directory, not mandatory, and if any one of them is violated it is not reversible error. This more than anything else has helped to stop the practice, which still prevails in the United States, of litigating legal procedure.

United States. While little has been done in the United States to reform our system of organization of courts and to reform our legal procedure ("the etiquette of justice"), there has been much discussion of the subject, and many of the leading judges, practitioners, and law teachers have been endeavoring to get the people of the United States to do something. Among those who have taken this position of leadership may be mentioned Chief Justice Taft, Hon. Elihu Root, Dean Roscoe Pound, Dean John H. Wigmore, and Professor Edson R. Sunderland. The American Judicature Society is an organization with headquarters in Chicago which for years has been devoting itself to this enterprise. The American Bar Association and many state bar associations have advocated many specific reforms. Commissions to investigate the subject and report have been appointed in many states. The American Law institute, composed of nearly a thousand of the leading law teachers, practitioners, and judges of the United States and heavily endowed, is now engaged upon a restatement of all the substantive common law, and may, before it is thru with its work, if a reform does not come in some other way, undertake to reform our legal procedure.

Because of our dual form of government it is going to be difficult to reform our judicial system so as to make it function with the efficiency of the modern English judicial system. To reform the federal system and each of the various state systems separately will not accomplish what is desired in the way of abolition of multiplicity of suits. That can be accomplished only by an amalgamation of all the state and federal courts into one system. This could easily be done, if political consent for such a change could be obtained, by so far as necessary turning the state trial courts into federal district courts and abolishing all other state courts, but no one expects such a reform ever to be brought to pass. Hence this part of the reform may never be accomplished.

The same problem is met with in connection with the reform of legal procedure. Here, also, the way of reform seems to lie in the direction of the modern English reform. But it is going to be difficult to get such a reform into both the federal courts and all of the state courts. Yet this is what ought to be done, and this may not be so difficult of accomplish-

ment as the reorganization of our courts. Perhaps if the federal courts would adopt the modern English legal procedure, pursuant to power conferred upon them by Congress, the various states might one by one follow the example of the federal government.

The Future. What is going to be the future development of Anglo-American Law? Will there be further growth in the present Period of Socialization? Will this period be followed by another period, and if so what will be the nature of it? Is the legal pendulum going to continue to swing back and forth from the side of reaction to progress? These and many other questions will have to remain unanswered.

The answer to what the student and others interested in the improvement of the law should do is not so difficult. In the future such men must study the behavior of men as well as the law chronicles of the centuries. Legal scholarship must show less devotion to logic and more devotion to social reality. It must attempt to get under and behind the applicable legal rule and illuminate it by a study of the particular social and economic phenomena it purports to control. It must enlist the coöperation of economist, sociologist, political scientist, and philosopher. The forward-looking scholar who has searched for the historical bases of our law will not take up arms against certainty and predictability as certainty and predictability, but he will insist that certain and predictable rules shall work well here and now in the social world in which we live and that justice shall not be sacrificed on the altar of logic.



PART THREE

SHORT BIOGRAPHIES OF SOME GREAT ANGLO-
AMERICAN LAWYERS



CHAPTER XV

GREAT LAWYERS OF ENGLAND

SOME knowledge of the great practitioners, judges, and law writers and teachers of England and the United States should be possessed by every member of the legal profession. Such knowledge may not help them to win cases, but it will help them to be better members of society and of that profession which boasts a gallery of portraits unequaled by any other profession. The lawyer should be more than a money-grubber; more than a hireling letting out his services to the highest bidder. He is a member of a profession which has undertaken to perform one of the greatest social services known to man, that of administering justice on earth. Such a task requires for its execution more than a knowledge of precedents. It requires a knowledge of all the subjects of human study. While this requires especially a knowledge of the social sciences, yet the ideal lawyer is a broadly educated man; he is a man of culture; he is a member of a learned profession, and is himself a learned man; and no lawyer can call himself learned unless he has an acquaintance with the names and the work of the great men who have preceded him in his profession.

Not all of the great lawyers of England and the United States can be referred to, even in a brief way. There have been too many. The lawyers for example have almost filled the benches of the Lords and the halls of Congress. But perhaps enough of the greatest can be referred to to give the modern law students and lawyers an appreciation of those who have lived in the past, and to enrich their minds with information that will be entertaining, cultural, and inspirational.⁴⁵ Other things being equal, preference has been given to the lawyers of the past who have stood the test of time.

Archaic Period. The lawyers of the Archaic Period who made a lasting reputation for themselves are not numerous, and the facts preserved in regard to those who did are meager, but the few things of interest in regard to them will be related.

⁴⁵ Zane, "Five Ages of Bench and Bar of England", 1 *Select Anglo-Am. Essays*, 625; Foss, *Dictionary of the Judges of England*; Campbell, *Lives of the Chief Justices*; Campbell, *Lives of the Lord Chancellors*; Pollock and Maitland, *Stubbs, Hallam, and other historians*.

Normans. The common law owes its origin to the Normans, not the Anglo-Saxons, as it is frequently said. The Normans seemed to have a genius for organization, and the Norman barons attended to their judicial duties with zeal. A new system of courts, legal procedure including the jury system, a true criminal law of the state, and a law of real property were imposed by the Normans upon an unwilling people. William the Conqueror began this great work. The *Curia Regis* goes back to him, and he permitted the Ecclesiastical Courts to be created. His chief legal adviser was probably an ecclesiastic and professor of law, Lan Franc, archbishop of Canterbury (1005-1089), who was the author of the *Domesday Book*. The chief legal adviser of William II was another priest, Flambard, bishop of Durham (-1128), who, tho a churchman and learned in the civil and canon law, did everything possible to aid the king to build up a secular law and secular tribunals. He was the author of various schemes for filling the royal treasury. Among these may be named reliefs, wardships, and the bringing of church lands under the feudal system, so as to make church temporalities devolve upon the king during vacancies. He was able, artful, but unscrupulous, and was hated by the churchmen. Roger of Salisbury (-1139), another ecclesiastic, was responsible for the creation of the Court of Exchequer. Alberic de Vere (-1140), a great chamberlain of Henry I, was both a great lawyer and noted because he became head of a house conspicuous for its great lawyers.

First Plantagenets. The work begun by the Norman kings was completed by the first Plantagenets. Henry II's reign was remarkable for its legal development. Henry II often sat in court. Luci (-1179), one of Henry II's chief justiciars, was joint author of the Constitutions of Clarendon, whereby the king tried to obtain for the king's courts the jurisdiction of the church courts. But the two greatest lawyers in the time of Henry II were Ranulf Glanville and Thomas à Becket.

Glanville (1130-1190). Glanville is noted for his treatise on the *Laws and Customs of England*. This was the first English law treatise and the greatest until the publication of Bracton's treatise. It was mostly a book on procedure. Glanville was a layman. He had held an office in the Exchequer and had been sheriff before he was appointed justice itinerant. After this

experience he was made chief justiciar by Henry II, and sat at Westminster. He was executor of the will of Henry II, assisted at the coronation of Richard I, and went with the latter to Jerusalem and died at Acre.

Becket (1118-1170). Thomas à Becket, archbishop of Canterbury, was chancellor under Henry II, and one of the two English chancellors numbered as saints. He has been called the first English chancellor, but probably the office had existed for some time prior. Scutage was substituted for military service on his advice. He devised statutes on legal procedure, and with the king and his chief justiciars removed private oppression, suppressed robbery, restored property wrongly held, and generally helped to vindicate the supremacy of law over force. But he was a churchman, educated in the canon and civil law at Paris, and he opposed the king in his project to take jurisdiction away from the Ecclesiastical Courts. In his fight with the king he at one time fled to Louis of France. He was recalled, but he was finally killed. Because of this the people turned against the king, and he failed in his campaign against the Ecclesiastical Courts. Otherwise the King's Courts might have taken over the jurisdiction of the Ecclesiastical Courts at this time.

During the reign of John the outstanding lawyer was Geoffrey Fitz Peter (-1213). He is responsible for the rule that realty devolves upon the heir and personalty upon the personal representative, which resulted from a decision rendered against his own personal interest, that a will of lands was invalid. But he is chiefly known for the restraint which he exercised over John. This was such that the king both feared and hated him, and on his death the king said, "I am now king and lord of England."

Henry III promised to appoint as judges only men who knew the law, and as a consequence his reign is conspicuous for trained lawyers. The greatest of these was Bracton, but two others whom Bracton canonized in his treatise and cited almost as his sole authority were Pateshull (-1229) and Raleigh (1250). All three were priests. Raleigh is reputed to have devised many new writs.

Bracton (-1267). Bracton's father was a vicar of the church at Bratton of which Raleigh was rector. After Bracton had studied at Oxford, Raleigh made him his clerk. There-

after he became justice in eyre and traveled the circuits for twenty years (1245-1265). He was made sergeant-at-law in 1245, and part of the time sat at Westminster, but because of his leaning towards the party of the barons (Simon de Montfort) he was dismissed by the king from the king's court. Bracton was a great lawyer, but he is chiefly famous as a law writer. His book was the greatest treatise on the law of England until Blackstone's *Commentaries*, which were written five hundred years later. Formerly it was thought that Bracton's book was only an attempt to introduce Roman law as the law of England, but with Vinogradoph's discovery of Bracton's note book in the British Museum in 1884 it was discovered that Bracton had made a careful statement of the actual law of England. He examined five hundred precedents and discussed writs and gave us the common law as it had then developed. His general conceptions, arrangement, and classification he took from the civil law with which he was familiar, and where there was no common law he sometimes supplied civil law, but the substance of his book is the law which had been administered by the courts. His treatise shows that England in his time had a rationalized legal procedure, a true criminal law of the state with direct punishment instead of compositions, a developed law of real property, and fixed rules of law. Professor Woodbine of Yale University is now working upon a translation of Bracton.

Strict Period. The Strict Period was the period of the common law lawyer. There were many practitioners and judges of eminence in their day, but few who left any permanent reputation or impression upon the law. They were logicians. They could win cases. Their contemporaries probably thought of them as little gods, but the verdict of history is that it takes other stuff to make great lawyers. This period, therefore, does not compare with the next Period of Equity in illustrious names. There are many names which should be mentioned, but few that should receive much emphasis. The lives of this period become somewhat monotonous, but the student should at least read enough about them to become familiar with some of the names.

Last Plantagenets. The lawyers who should be mentioned in the time of the last of the Plantagenets are Francis of Accursii, Robert Burnel, Hengham, Bereford, Hilary, Staun-

ton, Herle, Stonore, Parning, Cavendish, Tresilian, Waltham, and Wykeham. Edward I had a great reputation as a law-giver, and has been called the English Justinian. The reason for his reputation is the fact that he had the good judgment to keep at hand and to follow the best legal advice. He had constantly at his side the great Italian lawyer, Francis of Accursii. His closest friend was his chancellor, Robert Burnel (-1292), who drew the Statute of Wales, which projected the English law over Wales. Hengham (-1309) was called the father of common law judges and was an authority on writs. He wrote two works on procedure called *Hengham Magna* and *Hengham Parva*. He was also the author of the Statute *de Donis*. He was chief justice of the King's Bench under Edward I until impeached on trivial charges and removed by Parliament in 1289. He was restored to the bench and made chief justice of the Common Pleas ten years later, and was reappointed by Edward II. Bereford (-1326) succeeded Hengham as Chief Justice of the Common Pleas. He served as judge thirty-four years, and was one of the greatest characters on the bench in the time of Edward I. He was sharp with attorneys and other judges, swore on the bench, and despised the Anglo-Saxon wager of law. The barons changed the monarchy to a narrow oligarchy in the reign of the frivolous and foolish Edward II. Edward III's reign was vigorous and brilliant, and largely occupied with French wars. Robert Parning (-1348) was chancellor under Edward III and was the first regular common law lawyer appointed to that office. Cavendish (-1381), tho a judge of rectitude and integrity, had his house plundered and burned and himself beheaded in Wat Tyler's rebellion of 1381, because tho the rebellion was against villein services and rentals there was great feeling against the lawyers. Tresilian (-1388) was made chief justice of the King's Bench after the murder of Cavendish and tried and punished the insurgents. He was the most cruel judge in England until Jeffreys. He countenanced whatever was agreeable to the king, Richard II. He was finally accused of high treason, captured in disguise, and beheaded. Wykeham (1324-1404) held the office of chancellor for short times under both Edward III and Richard II. He is chiefly known for his correction of the abuses of religious houses and the building of colleges and cathedrals. The common law

judges in this time were chosen from the sergeants of large practice.

Lancaster and York. The chief lawyers during the reigns of the houses of Lancaster and York were Thirning, Rickhill, Gascoigne, Hankford, Markham, Danby, Norton, Prisot, Hody, Croyle, Choke, Brian, Skrene, Yelverton, Fortescue, and Thomas Littleton. Thirning (-1413) was appointed as one to receive the resignation of Richard II, because Henry IV did not want to offend the lawyers. He was appointed chief justice of the Common Pleas by Richard II, and Henry IV, and Henry V. Gascoigne (-1419) was chief justice of King's Bench under Henry IV. When the king commanded him to pronounce sentence of death on Archbishop Strobe and Earl Mowbray for leading an insurrection, Gascoigne answered, "Neither the king nor any of his subjects can according to the law of the realm sentence a prelate to death, and the Earl has a right to be tried by his peers." Gascoigne also once put in jail for contempt the king's son, Prince Henry, who drew his sword in court because the chief justice would not release him; but when Prince Henry became Henry V he did not reappoint Gascoigne because of the indignity laid upon him. Hankford (-1422) was justice under four kings—Richard II, Henry IV, Henry V, and Henry VI. He had a high reputation for moral and legal character. John Markham (-1479) kept from the civil contest of the times, and was justice of King's Bench under Henry VI and chief justice under Edward IV. Danby (-1471) was justice of the Common Pleas under Henry VI and chief justice under Edward IV, and continued on the restoration of Henry VI for six months, but was not reappointed by Edward IV. He committed suicide because of the perplexities of the times by ordering his keeper to shoot anyone walking in his park who did not answer the keeper's challenge. Prisot and Hody (1441) helped Littleton on his *Treatise on Tenures*. The two greatest lawyers of this period were probably Fortescue and Thomas Littleton.

Fortescue (-1476). John Fortescue was a great practitioner, judge, statesman, soldier, writer, and scholar. He was a Lancastrian, and chief justice of the King's Bench under Henry VI, but was attainted of high treason, as one engaged in the battle of Towton, by the first Parliament of Edward

IV, and his possessions were forfeited to the king. He worked hard for the restoration of Henry VI, but after the death of Henry VI and his son, Fortescue retracted all he had said against Edwards' title, his attainder was reversed, and he was appointed a privy counsellor.

Littleton (-1481). Thomas Littleton's name is still sacred in Westminster Hall. After going thru the usual preliminary steps of study in one of the Inns of Court (Inner Temple), of practice (in Chancery), and becoming a king's sergeant, he was appointed by Edward IV a justice of the Common Pleas, where he presided from 1466 to 1481. He was a judge of great learning and impartiality, and, tho a Yorkist, was uninfluenced by the passions of the contending political parties. He was granted two pardons, not for any offenses but for abundance of caution, to cover any possible irregularities when he was at one time sheriff. His celebrated *Treatise on Tenures* is one of the greatest works of the common law. Coke called it "the most perfect work ever written".

Tudors. The great lawyers in the time of the Tudors were Sir Thomas More, Cardinal Thomas Wolsey, Edward Montagu, and James Dyer. Edward Montagu was made chief justice of the King's Bench by Henry VIII in 1539, but removed and became chief justice of the Common Pleas in 1545 because the new position was more profitable tho less exalted. He did the dirty legal work of Henry VIII. At first he refused to agree to the settlement of the crown on Lady Jane Grey by Edward VI's will, but at last on the command of the king under the great seal (with a general pardon for obeying) he consented. For this Mary committed him to the Tower, but upon his drawing up a complete narrative he was discharged upon the payment of a fine. James Dyer was judge of the Common Pleas and chief justice under Elizabeth, after two Catholics had been degraded. He also read to his society on the Statute of Wills. A glory surrounded his name because of his efficiency, firmness, and patience. He "did keepe the prowde in awe". But all other lawyers in this period were eclipsed by the great chancellors Cardinal Wolsey and Sir Thomas More.

Wolsey (1471-1530). Cardinal Thomas Wolsey was probably the most extraordinary man who ever ruled the destinies of a kingdom. His father was a butcher. He graduated

from Oxford at the age of fifteen, a "boy bachelor". He was maintained at Oxford by friends instead of his father, but his father gave him a legacy upon condition that he become a priest within a year. He did not become a priest for four years after his father's death (1500). He was handsome and free and easy in manners, and after he had obtained his first parish got drunk and was put in the stocks, so that he had to retire from the parish, but when he became chancellor he punished the knight who had put him in stocks by forbidding him to leave London. Next he became chaplain to the lord keeper of the Great Seal, and then to the king, Henry VII. Henry VII sent him on a mission to Maximilian at the time of the marriage of his daughter, and he was back successful within four days, insomuch that the king asked "why he had delayed going". Then he was given the deanery of Lincoln. Henry VIII appointed him one of his council and then almoner. He meanwhile became bishop of Lincoln, archbishop of York, and finally cardinal in 1515, by appointment of Pope Leo X. All this time, tho only royal almoner, he relieved the monarch of his political labors and really was the chief adviser and mover in all state affairs. In 1515 the king appointed him lord chancellor, after Wolsey had forced Markham's resignation from the chancellorship so that he could get it. His attendance in chancery was regular and punctual, and his decrees equitable and just. He also sat in the Star Chamber, Legatine Court, and minor courts. His downfall was due to Anne Boleyn, who thought he had played her false, tho her marriage did not occur until two and a half years after his death. He was accused of violating, under legatine powers from the Pope, an old statute of Richard II, and he allowed judgment to go against him. Parliament failed to impeach him and the king pardoned him, but at the price of most of his possessions. But he was arrested for high treason by the Earl of Northumberland as he was preparing to be installed as archbishop, and on the way to London he fell mortally ill and died in 1530. Wolsey was vain, ambitious, and avaricious. His income was enormous, and was derived from church offices, bribes, and pensions. His love of ostentation was shown in his daily processions to Westminster. The popedom was his aspiration. He was vindictive, but not cruel, and he had a violent temper. Yet a

detail of the political occurrences of his life would give a history of the civilized world of his time. Shakespeare has immortalized him in his play, *Henry VIII*.

More (1478-1535). Eight days after the Great Seal had been taken from Cardinal Wolsey it was given to Sir Thomas More, who became chancellor in 1529. Probably no man on earth was ever better fitted to hold that office. He was a son of John More, a judge of the King's Bench and Common Pleas under Henry VIII, who probably procured his place on the bench because of his illustrious son. He went thru the customary apprenticeship and schooling. He studied at Oxford and was a friend of Erasmus, and while at Oxford devoted himself for two years to literature. He also was admitted to Lincoln's Inn while still at Oxford, and later was appointed governor of this inn by Henry VIII, where he was a reader in 1511 and 1516. At one time he was inclined to the priesthood, but he went into practice and attained such a reputation that he was employed as counsel by one of the parties in almost all actions. He defeated a grant of money by Parliament for the marriage of Henry VII's daughter, for which his father was sent to the tower until he paid a fine. He was sent on two embassies by Henry VIII and offered a pension, but he declined the pension because it was no more than he was getting and he wanted to be free from the king. He entered the Privy Council in 1520, and was speaker of Parliament in 1523. He was intimate with the king and Cardinal Wolsey. He published his *History of Richard III* and his *Utopia* in 1516. Finally he succeeded Wolsey as chancellor. His modesty was in contrast with Wolsey's arrogance. His diligence was so great that he caught up with his calendar. He refused bribes and gifts. When the common law judges complained that their judgments were suspended by injunctions, he called them together and made them admit the injunctions were just, and advised them to reform the common law. But he held this high office for only two and a half years, and resigned because of a question of the king's marriage. He refused to take an oath that the king's first marriage was invalid, and for this he was attainted and his property taken. The king then tried to trap him by getting him to deny that the king was the head of the church. Rich, in a familiar secret talk, got from him the statement

that a subject could not so consent, and an obsequious jury found him guilty of treason and he was beheaded.

Period of Equity. The Period of Equity was rich in the names of great lawyers. This period was as brilliant as the Strict Period for the most part had been dull. Among those who should be named for their great attainments are Coke and Bacon, whose work fell partly in the Strict Period and partly in the Period of Equity; Hale, Rolle, Nottingham, Clarendon, Vaughan, Somers, Holt, Talbot, Hardwicke, Lord Mansfield, Thurlow, and Blackstone. There were some lawyers in this period so bad that they should be mentioned for their meanness. Chief of these were Scroggs and Jeffreys.

Coke (1551-1633). One of the most famous of the common law lawyers was Edward Coke. Intellectually he belonged with the lawyers of the Strict Period, and his work as a practitioner occurred in that period. His father died when he was ten, and his mother when he was eighteen. His career went thru the usual stages of a prominent English lawyer. He attended Trinity College, Cambridge; was a student at Clifford's Inn and the Inner Temple; within a year after his call to the bar was made a reader at Lyons Inn; soon he was engaged in almost all the prominent cases; became recorder of Coventry and London; became solicitor-general, reader on the Statute of Uses at his Inn; treasurer of his Inn; speaker of Parliament; attorney-general; chief justice of the Common Pleas (1606); and chief justice of the King's Bench (1613). Coke acquired a fortune of £30,000 on his first marriage, and five months after the death of his first wife married Lady Hatton over his rival, Francis Bacon. This perhaps was the beginning of the bitter and jealous enmity of Coke and Bacon. At any rate, they were life-long rivals and enemies. Coke prosecuted Sir Walter Raleigh in a brutal and disgusting manner, and also the conspirators in the gunpowder plot, and before he became judge generally tried to out-Bacon Bacon in flattery of the king; but after he became judge he became independent, asserted the independence of a judge, and opposed the king, giving an opinion in opposition to the Council that the king could not create a new offense. He was promoted to the chief justiceship of the King's Bench on Bacon's suggestion to further Bacon's ambitions. Coke resisted the power of the Court of Chancery presided over by

Ellesmere, but was defeated in this contest because of a decision of James brought about by Bacon. Coke was removed from office in 1616, but thru the marriage of his daughter to a brother of the Earl of Buckingham (which Bacon could not prevent) he was restored to the Council and was employed on various commissions. He was returned to Parliament in 1621, when he began a parliamentary career. He spoke strongly for the remonstrance to the king, and was one of the managers of the impeachment of Bacon. Tho sent to the Tower for seven months in 1621 he was back in Parliament again in 1623. In the first Parliament of Charles I he opposed a grant of supply without a redress of grievances, and in the third Parliament advocated the liberty of the subject and succeeded in carrying the Petition of Right. Then he retired and devoted the last five years of his life to writing his *Commentary on Littleton* and treatises on *Magna Charta*, *Criminal Law*, and *Jurisdiction of Courts* (His Four Institutes). These were seized on his death-bed on the order of the king, and were only published seven years afterwards when delivered up to his son by vote of Parliament. He also published seven volumes of reports. Coke was cold by nature, and addicted to coarseness and brutality of language at the bar and on the bench, but he was free from corruption and was the outstanding champion of the common law as it had been.

Bacon (1560-1626). Francis Bacon was the son of Sir Nicholas Bacon, keeper of the Great Seal, and Anne Cooke Bacon, an accomplished mother. His legal progress was typical. He was sent to Trinity College, Cambridge, but left after three years from disgust with the system of education, and went to France with Ambassador Paulet, but was summoned home by the death of his father; he entered Gray's Inn; was called to the bar; entered Parliament; was made a reader at his inn on the Statute of Uses; obtained the reversion of the registrarship of the Star Chamber thru his uncle Burleigh, but no vacancy occurred for twenty years thereafter; sought appointment as attorney-general when a vacancy occurred in that office, but Coke was chosen by Elizabeth and Bacon was not given even Coke's position as solicitor-general, but he was made queen's counsel; took an active part in the prosecution of the Earl of Essex, in order to curry favor with the

queen, altho Essex had been his friend and greatest benefactor; on the death of Elizabeth began to push himself for office as usual, but was not appointed to any office except king's counsel until 1607 when he was made solicitor-general; when on his own suggestion Coke was made chief justice of the King's Bench he was made attorney-general in 1613; and finally in 1616 he was made chancellor, following Lord Ellesmere. He was an unsuccessful rival with Coke for Lady Hatton, and a life-long enemy of Coke. He published his *Essays* in 1598, and his *Novum Organum* in 1620. Bacon was a fulsome flatterer and always pushing himself forward. The Commons accused him of having received bribes, fined him £40,000, imprisoned him in the Tower and incapacitated him from holding office, but the king later remitted the fine and pardoned him. He was summoned to the Parliament called by Charles I, but was too sick to attend. He died trying an experiment as to the preservation of meat in snow. Bacon was a fair orator, an eminent philosopher, a finished lawyer, an energetic judge, and a man guilty of all the faults of which he wrote,—depreciation and envy of rivals, adulation of king, ingratitude to friends, encouragement of despotism, and susceptibility to bribery.

Nottingham (1621-1682). Heneage Finch, Earl of Nottingham, has been called the father of equity. He attended Christ Church, Oxford; was a member of the Inner Temple, of which in later life he was treasurer and reader; was called to the bar and attained a good practice, as is shown by Siderfin's *Reports*; was returned to Parliament in 1660; a week after the king's return was appointed solicitor-general and given a baronetcy; he was next appointed attorney-general; then lord keeper of the Great Seal; and finally chancellor in 1675. Nottingham was a loyalist, and wholly conducted the trial of the regicides. The trial was fair, but he said that Milton ought to be hanged. He lived at Kensington, which was later bought by William as a palace for the king. He was called the "English Cicero". He summed up the evidence in the trial of Lord Morley for murder. He presided as Lord Steward three times, in the trials of Pembroke, Cornwallis, and Stafford. He was a man of great ability and incorruptible. There is not one story to his discredit. He was the author of the Statute of Frauds, but his principal work was

in equity. He began to reduce it to a system, and for this he is still venerated in Westminster Hall.

Somers (1651-1716). John Somers was made chancellor and a peer (Baron Somers) in 1697. The Tories attacked him in Parliament and the king asked him to resign; he refused; but the king ordered him to deliver up the Seal, which he did in 1700. Prior to this he had gone thru Trinity College, Oxford; been registered at the Middle Temple and called to the bar; had acquired a good law practice and was one of the defense of the seven bishops; was chairman of the committee of the Commons to whom the Declaration of Right was referred; became solicitor-general; recorder of Gloucester; attorney-general; and lord keeper. He was a champion of the Liberal party and published anonymously legal and political pamphlets. This hindered his promotion under Charles II and James II. He was impeached by the Commons, and dismissed by the House of Lords because of failure to prosecute but retained the friendship of King William. During the life of Queen Anne's husband he was obnoxious and confined himself to duties in Parliament. In 1708 he was made lord president of the Council. During the two years he lived under George I he had a place in the Cabinet without office. He was president of the Royal Society from 1698-1703, when he resigned in favor of Sir Isaac Newton. He was eloquent, honest, modest, a great leader of a great party, and a man of learning and judgment. His decisions in Chancery are reported in Vernon and P. Williams.

Talbot (1684-1737). Charles Talbot was probably the greatest chancellor after Nottingham. He had a short but illustrious career upon the bench. He was sent to Oriel College, Oxford; entered the Inner Temple and was called to the bar; acquired a leading practice in equity courts; became solicitor-general, as well as a bencher and reader at the Inner Temple and Lincoln's Inn; and was appointed lord chancellor and made Baron Talbot in 1733. His promotion was celebrated by the last of the revels of the Inns of Court. He had intended to enter the clerical profession, but changed to the legal profession on the advice of Lord Chancellor Cowper. His father was a bishop of such extravagance that on two occasions his son had to pay his debts. He was a most efficient and impartial judge. Because of his patience, discrim-

ination, and reasonableness, he was praised by both sides. The following is one story told of him. He had promised Sir Robert Walpole to give a living to a certain rector. When the rector came for the living, he mentioned the petition of the curate to be continued and begged it might be granted. The rector-expectant answered that he had already promised it to another. Chancellor Talbot then refused to give the rector the living, but gave it to the curate instead.

Hardwicke (1690-1764). Chancellor Talbot was succeeded by Philip Yorke, Earl of Hardwicke, who was the son of an attorney; attended a private school; studied law under Salkeld; was admitted to the Middle Temple and called to the bar; gained a considerable practice largely due to Lord Macclesfield, chief justice of King's Bench; became solicitor-general; then attorney-general; entered Parliament and was promoted to the House of Lords; became chief justice of the King's Bench; and finally in 1737 Lord Chancellor. He married a daughter of the sister of Lord Somers. He was excused from taking part in the impeachment of Lord Macclesfield. He published a book on the judicial authority of the master of the rolls in chancery. He refused the office of chief justice until the salary was raised from £2,000 to £4,000. He was recorder of Gloucester from 1734 till his son Charles succeeded him. He did not accept the chancellorship until a grant in reversion of a fellowship in Exchequer was given his son, but he retained the Great Seal twenty years, and during that time made his name illustrious. He was characterized by beauty of person, urbanity of manner, and sweetness of voice; and excited the animosity only of Horace Walpole. In the absence of the king from England he had the principal management of the kingdom (with two others,—the Duke of Newcastle and Robert Walpole). As one of the lord high stewards he prosecuted the rebels of 1745. He was made a steward of the University of Cambridge, tho not a university man. He was made a peer in 1754. In 1756 he resigned the Great Seal, because the Duke of Devonshire succeeded the Duke of Newcastle, and refused it on the return to power again of the Duke of Newcastle. He has been criticised for his partisanship as a statesman; he was not a law reformer; but he was a man of transcendent abilities as a magistrate. He was never reversed. Some think his repu-

tation as a lawyer and judge was never exceeded by anyone except Lord Mansfield. He was probably the greatest English chancellor, certainly the greatest in the Period of Equity. Only Sir N. Bacon, Ellesmere, and Eldon held office longer.

Thurlow (1732-1806). Edward Thurlow was the last of the chancellors in this period. He was a man of great coarseness and great talent combined, and often ranked with Hardwicke, but he was not entitled to this distinction. His father was a rector. As a boy he was contumacious, overbearing, and insubordinate, and these characteristics continued thru life. He attended Cains College, Cambridge, until he was expelled. When once asked if he knew he was talking to the "dean", he answered, Yes, and ever afterwards addressed him as "Mr. Dean" even when he appeared in his court when he was no longer dean; and he appointed him one. He was articled with the poet Cowper to an attorney Chapman and became a member of the Inner Temple, where he was dissipated but studied hard. He was called to the bar; and successively accepted a silk gown (King's counsel); took a seat in Parliament; became solicitor-general; attorney-general; and in 1778 lord chancellor, which office he held twelve years. He supported Lord North in Parliament against the United States. He was out of office nine months after the fall of North, but resumed office with Pitt. He opposed Pitt and negotiated with the prince's friends during the insanity of the king, and when he next opposed Pitt he was exposed and removed from office. He was a political chancellor, and failed as such. His judgments were excellent, but this may have been due to Mr. Hargrave. His features "made him look wiser than any man that ever was". When the Duke of Grafton twitted him of plebeian origin, he gave him a wonderful rebuke: "The peerage solicited me, not I the peerage. As a man I am as respectable and as respected as the proudest peer."

Hale (1609-1676). Sir Matthew Hale was a common law judge of this period, whose work came shortly after that of Lord Coke. Of him a learned American judge once said: "In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta, and the meaning once ascertained, they do not trouble themselves to search any further."⁴⁶ He was educated at

⁴⁶ 6 Cow. (N.Y.) 536, note.

Magdalen Hall, Oxford. He was an athlete and sought pleasures, but not vices. He thought at first of being a divine, then a soldier; but on the advice of Sergeant Glanville chose the law; entered Lincoln's Inn; and was called to the bar, when he forsook his former vanities. He became proficient in mathematics, philosophy, medicine, history, theology, and in the practice of the law. He was a loyalist, defended eleven members in 1647, offered to plead for the king and gave him his line of defense (jurisdiction), and defended others accused of high treason. He subscribed to be true to the Commonwealth because it was the existing government, and was therefore allowed to appear before the High Court of Justice. Parliament put him at the head of a committee to prevent delays and expense of the law. Cromwell made him a judge of the Common Pleas in 1654, but he refused to try offenders against the state, convicted one of Cromwell's soldiers of murder, and dismissed a jury returned by Cromwell instead of the sheriff. Protector Richard refused him a commission. He then was returned to Parliament, first from the University of Oxford, then from Gloucestershire, and was manager of the conference which led to the return of the king. He was confirmed as sergeant and member of the commission for the trial of the Regicides. In 1660 he was made chief baron of the Exchequer, and knighted by surprise. In 1671 he was made chief justice of the King's Bench, but resigned in 1676 on account of ill health. He wrote a *History of the Pleas of the Crown*, *Preface to Rolle's Abridgement*, and an *Analysis of Law*, which was the basis of Blackstone's *Commentaries*, and a treatise called *De Portibus (Jure) Maris*; and was more than anyone else the founder of the law of public callings. He was a man of the finest character, and one of the brightest luminaries of the law. He ranks with Holt and Mansfield.

Holt (1642-1710). John Holt was another common law judge in the same class with Sir Matthew Hale. He was the son of a lawyer. He attended Oriel College, Oxford, but was idle and dissolute. Later he reformed and devoted himself to his profession. He entered Gray's Inn and was called to the bar at a very early age. From 1679 till James's reign he was engaged in most of the state trials, at first for the prosecution; but later, because of his disgust over the govern-

ment's proceedings, for prisoners. Even Scroggs, Pemberton, and Jeffreys treated him with respect. He was given the recordership of London, the degree of the Coif, and made a King's sergeant; but he was removed from office because he refused to pronounce sentence of death on a soldier who ran away from the colors in peace time. He was made chief justice of the King's Bench by William in 1689. He and Eyre resisted the House of Lords when required to give their reasons for a judgment, by refusing to do so unless the case was taken to the House of Lords on a writ of error. He refused to punish anyone for witchcraft, but put in the stocks a man who claimed to have been bewitched. He was asked to be lord chancellor on the removal of Somers; but he excused himself, saying that he had "never had but one chancery case and lost that". However, he acted as commissioner until the vacancy was filled. His name excited universal admiration. With him began a new judicial era. He kept aloof from political intrigues. He was not a mere logician, as the common law lawyers of the previous period had been, but he was a jurist who believed that justice was more than precedent; common sense more important than tradition. Our modern law of bailments is one of his contributions to the reform of the old common law. On one occasion he is said to have dispersed a mob after telling an officer that he would hang the soldiers if they shot.

Lord Mansfield (1705-1793). William Murray, Lord Mansfield, was not only the greatest common law judge, but the greatest judge of any kind in Anglo-American legal history. He was born in Perth, Scotland. His father was a landlord. He attended Christ Church, Oxford, where he was noted for his oratory and where he took both a B.A. and an M.A. degree. He had been intended for the church, but was enabled to gratify his natural inclination for the bar by the generosity of a Lord Foley, father of a friend of Mansfield. He entered Lincoln's Inn, was called to the bar at Lincoln's Inn, and began practice before chancery. At first he had no encouragement, and lost the girl he wanted to marry; but at the end of eighteen months he had three appeals before the House of Lords, one of which was in the *South Sea Bubble Case*. Following this he had a great practice. He was solicitor-general from 1742 to 1754 and entered Parliament, which was the

usual thing for a solicitor-general. In 1754 he was made attorney-general. He was a great success in Parliament. He was exceeded only by his antagonist Pitt. He was the prop of the government under the Duke of Newcastle, and he was so important that Newcastle tried to get him to give up the appointment to the chief justiceship of the King's Bench when a vacancy occurred, but without avail, and he was made chief justice of King's Bench and Lord Mansfield in November, 1756. The Duke of Newcastle soon fell. Mansfield presided over the King's Bench for thirty-two years with dignity and efficiency. He reformed the practice before the court (allowed Turks and Hindoos to swear according to their own religion); founded the commercial law of the country; introduced some of the most important principles into the law of contracts (implied conditions, moral consideration, illegality); pronounced free a slave brought on English soil; and decided that the property in wrecks did not go to the crown if the owner could identify it tho no living thing came ashore. In only two cases while he presided was the court not unanimous, and only two of his judgments were reversed. He was made earl in 1776. He declined the office of lord chancellor. His character, none will surpass. He was liberal and tolerant of religion. Yet in spite of this he was once attacked by a mob, which had the usual intelligence of a mob and which destroyed his library. He was a great oracle of the law. Of him it has been said "Ninety-nine times out of a hundred he is right; when wrong, ninety-nine men out of a hundred would not discover it." If he is criticizable at all, it is for continuing to take part in political debates after he assumed judicial office.

Blackstone (1723-1780). William Blackstone has exerted more influence on United States law than perhaps any other Englishman, and before the system of case instruction came into vogue here was given a rating above what he was entitled to by American lawyers. Physically he lived in the Period of Equity; spiritually he belonged in the Period of Maturity, with which he made United States law begin. He was a posthumous son of a silkman, and was educated by his mother's brother. He attended Pembroke College, Oxford, where he specialized in classics and sciences, wrote verses on Milton, the death of the Prince of Wales, and notes on

Shakespeare. He was admitted to Middle Temple, called to the bar, made bursar of his college, and steward of manors. His progress at the bar was slow and unproductive, and he had determined to retire in 1753, when Lord Mansfield recommended him for a professorship on civil law. The Duke of Newcastle gave the position to another, but on Mansfield's advice Blackstone read his lectures anyway. He was appointed professor of law on Viners' Foundation in 1758. His treatise on *Consideration of Copyholders* brought an act of Parliament giving them the vote. He refused the honor of the Coif and chief justiceship of the Common Pleas of Ireland, but resumed his attendance at the bar in 1759. His marriage two years later terminated his fellowship of All Souls, but he was appointed principal of New Inn Hall and given a patent of precedence in court and became a member of Parliament. He published the first volume of his *Commentaries* in 1765 and the remaining volumes by 1769. He declined the solicitor-generalship in 1770, but in the same year accepted a judgeship in the Common Pleas. He went to the King's Bench in exchange with Yates, who wished to avoid collision with Mansfield; but Yates died and Blackstone returned to the Common Pleas. Blackstone was a distinguished judge; he also took reports during his life and these were published after his death; but his reputation in the United States rests, for the most part, upon his *Commentaries*, which came out just before our country gained its independence, and which after independence became the chief if not the only law books in every lawyer's library, and the chief if not the only textbooks for every law student. Blackstone devoted the later years of his life to the reform of prison discipline, and the increase of judges' salaries £400. His corpulence increased in late life due to lack of exercise and the studious habits of his youth.

Other lawyers of the Period of Equity who should be mentioned are Henry Rolle (1589-1656), who compiled an *Abridgement of Cases and Resolutions of Law*, sided with the Puritans and was made chief justice of the King's Bench by the Commons in 1748; Edward Hyde (1608-1674), Earl of Clarendon, who was an enemy of Cromwell, resided with Charles II during his exile, and returned as chancellor in 1660; John Vaughan (1603-1674), who put an end to the practice

of fining juries and who once exclaimed, "What sin have I committed that I should sit on a bench with two judges who boast in open court of their ignorance of the canon law?" William Scroggs (-1683), chief justice of the King's Bench for a time under Charles II, who was ignorant, arrogant, and brutal, and whose conduct of the trial of those engaged in the Popish plot was outrageous; George Jeffreys (1648-1689), chief justice for a time under Charles II and lord chancellor under James II, the worst judge who ever disgraced Westminster Hall, drunken, partial, brutal, who executed 330 as traitors and transported 800 more in the "bloody assize" and burned Elizabeth Ganut alive; Lloyd Kenyon (1732-1802), Mansfield's successor on the King's Bench, offensive in manners, but honest and independent as a judge; and John Selden (1584-1654), lawyer and man of letters, who gave a library of 8,000 volumes to the Bodleian library.

Period of Maturity. The Period of Maturity in England was not as rich in names as the Period of Equity, yet there were many lawyers of eminence in this period, and some reformers who were imbued with the spirit of the Period of Equity. We shall refer first to those worthy of somewhat extended treatment, and then more briefly to a few others.

Bentham (1748-1832). Jeremy Bentham, who has been called the father of legislative reform, and who has had many followers who have taken the name of Benthamites, was the son of a London attorney, studied at Queen's College, Oxford, and Lincoln's Inn, and then devoted most of the rest of his life to writing and reform. He published a *Fragment on Government* in 1776 during an attack on Blackstone's theories in the first volume of his *Commentaries*, and an *Introduction to Principles of Morals and Legislation* in 1789. This was followed by *Panopticon*, a model prison. In 1792 he came into a fortune on the death of his father. He advised the leaders of the French Revolution. In 1814 he retired to his country estate, where he devoted himself to the poor laws, recasting of the law of evidence, and amplification of judicial procedure. He criticized Blackstone, but praised Mansfield. Bentham ought to have lived in the Period of Equity or the Period of Socialization, and Blackstone in the Period of Maturity.

Romilly (1757-1818). Samuel Romilly was one of the followers of Bentham. He was born in London, and was the

son of a jeweler and Huguenot refugee. He attended Gray's Inn; became a leader of the chancery bar; solicitor-general; and went into the House of Commons; and after he left the office of solicitor-general, as a legislator, devoted himself to the reform of criminal law, and wrote *Observations on the Criminal Law of England*. He opposed confinement in hulks, penalty for treason and attainder, and suspension of the writ of *habeas corpus*. He was opposed by Lord Ellenborough and at first could make no progress, but at last he triumphed by opening the eyes of England. In 1808 was repealed the statute making it a capital offense to steal from a person, and in 1812 the statute making it a capital offense for a soldier to beg without a pass from a magistrate or officer. Romilly's name became famous all over Europe.

Brougham (1778-1868). Henry Brougham was another follower of Bentham who carried on reform work after the death of Romilly. He was born in Edinburgh and educated at the University of Edinburgh. He published articles on "Light" and other topics in physics, and on the abolition of the slave trade, and helped to found the *Edinburgh Review* in 1802. He left Edinburgh for London and was called to the bar by Lincoln's Inn in 1807. He practiced before the House of Lords and the Privy Council, and by his eloquence procured a seat in Parliament in 1810, and in 1830 was called to the House of Peers. He acquired the leadership of his party. No question ever found him unprepared. His legal fame in the popular mind was established by his great defense of Queen Caroline, whom he defended so well that a bill of pains and penalties brought against her charging adultery was withdrawn. This so incensed the king that on the advice of Lord Eldon he refused Brougham a silk gown, but under Lord Lyndhurst, Brougham received a patent of precedence. He refused a baronship in the Exchequer to remain in the House of Commons. When the Whigs came into power under William IV he was made lord chancellor in 1830, and exerted his energies for the passage of the Reform Bill. He went out with his party in 1834, and was not reappointed in 1835, but continued to attend regularly on the hearing of appeals in the House of Lords and to further reforms. He was made lord rector of Glasgow in 1825, and chancellor of the University of Edinburgh in 1860. The carriage called "brougham" was named after him.

Erskine (1750-1823). Thomas Erskine also was born in Edinburgh. From 1764-1768 he was a midshipman and visited America. In 1768 he entered the army and became lieutenant in 1773; but he sold his lieutenancy and entered Lincoln's Inn in 1775 and Trinity College, Cambridge, in 1776. He was called to the bar in 1778. By this time his circumstances had become very straitened. He had married in 1770. His first case was a defense of Captain Baillie, and his oration against Lord Sandwich was so great that retainers came in from all sides. He became affluent and connected with all important litigation thereafter. He was given a patent of precedence only five years after his admission to the bar. He became a member of Parliament and supported Fox so hard that on the accession of Pitt he was made "one of Fox's martyrs". His oratory was better in the courtroom than in Parliament. His arguments in libel suits in favor of the jury's power led to the enactment of Fox's Libel Act in 1792. He was attorney-general to the Prince of Wales, but was asked by him to resign in 1793 because he insisted upon defending Paine's *Rights of Man*. He argued against constructive treason in the case of *Tooke et al.*; and not only got their acquittal, but freedom of speech and of the press in England. On Pitt's death he was made lord high chancellor (1806), and made a most satisfactory record, but kept the office only fourteen months, giving up the Great Seal because George III refused to sanction the bill giving Roman Catholics commissions in the army (altho he had been adverse to the measure). During the next fifteen years he was a man of the world, but in 1817 he appeared against restrictive measures. In 1820 he defended Queen Caroline and in his last speech in Parliament sounded the deathknell of bills of pains and penalties. He was courteous, witty, and honorable, but inclined to self-glorification, and lost his wealth in speculation. He was a lover of freedom, advocated protection for farmers, gave us liberty of speech and of the press, and reforms of the law of slander and libel. He was one of England's greatest orators and dedicated his great abilities to causes that were often unpopular but always the most noble.

Lord Stowell (1745-1836). William Scott (Lord Stowell) was the eldest brother of John Scott (Lord Eldon). He was a reader in ancient history at Oxford, a friend of Dr. Johnson,

and an authority on shipping law. He was called to the bar in 1779, and practiced in the Ecclesiastical Courts until 1821. In 1788 he was a judge of a Consistory Court. He entered the House of Commons in 1790, where he was a persistent opponent of all reform. He was judge of the High Court of Admiralty from 1798 to 1827 and was made a peer by George IV. In the High Court of Admiralty he was more of a lawgiver than a judge and established the principles of admiralty law for England. Some of the doctrines of international law with which his name is identified are: that all states are equal and independent; that semi-barbarous states are bound by the rules of international law; that a blockade must be effectual to be binding; that contraband of war is determined by its destination; and that a prize court is a court of the law of nations.

Lord Eldon (1751-1838). John Scott (Lord Eldon) was a brother of Lord Stowell, and the son of a coal dealer who transported coal. Lord Stowell, while a tutor at Oxford, persuaded his father to send John to Oxford and he took his B.A. there in 1770. Two years later he ran away with the daughter of a banker of Newcastle. This marriage, tho quickly forgiven by the parents, lost John Scott a fellowship and provision in the church. He adopted law as the alternative, entered the Middle Temple and took his M.A. in 1773; but working both at Oxford and the Inn endangered his health. However, he moved to London in 1775, studied in an office, and was called to the bar the next year; but his receipts during the first year amounted to half a guinea. Thinking Lord Mansfield favored lawyers educated at Westminster and Christ Church, he joined the chancery bar; but his business continued so small that he was about to give up, when he won a celebrated case, and obtained an important election case, and thereafter his success was assured. Lord Thurlow favored him and got him into Parliament where he supported Pitt against Fox. Afterwards he became successively chancellor of Durham; solicitor-general; attorney-general (when he conducted the prosecutions of *Tooke et al.* for constructive treason); chief justice of the Common Pleas—given him on condition that he accept a peerage and that he accept the chancellorship as soon as it should become vacant; and lord chancellor. He took this office in 1801, resigned when Fox

and Granville came in in 1806, but resumed his seat in 1807 and kept it for twenty years. He resigned when Canning succeeded Lord Liverpool, and was followed by Lord Lyndhurst. While he was in practice his income became such that he purchased the estate of Eldon for £22,000. In 1816 a mob broke into his house, and the House of Commons kept attacking him and his court. He did perhaps more than any other chancellor to reduce equity to a system. He was a man of extensive learning, courteous and just in his decisions, but slow and unprogressive.

Tenterden (1762-1832). Charles Abbott (Lord Tenterden) was one of the able judges of the King's Bench. He succeeded Lord Ellenborough as chief justice in 1818 after he had served as judge for two years, and was made Baron Tenterden in 1827. He was a man of common sense and justice, and introduced bills for the limitation of actions and for uniformity of procedure, altho he opposed many other reform bills. He was the son of a wigmaker and hair-dresser, made a fine record in grammar school and at Oxford, and specialized as special pleader and was junior counsel when Lord Eldon, Redesdale, and Ellenborough were attorneys-general.

Campbell (1781-1861). John Campbell is noted for his *Lives of the Lord Chancellors* and *Lives of the Chief Justices*, which are invaluable sources of information about these great English judges, but which contain too much Campbell, and are not as reliable as Foss's *Lives*. He also was chief justice of the Queen's Bench for nearly ten years and held the office of lord chancellor for sixteen days, when he died from the bursting of an artery. He was indefatigable in all of his pursuits and succeeded well as judge in both the Queen's Bench and Chancery, in spite of the fact that the practice in chancery was new to him. He attained these offices after prior experience typical of English judges. He was a graduate of the University of St. Andrews; entered Lincoln's Inn and Mr. Tidd's office; was reporter on the *Morning Chronicle*; reporter of cases; king's counsel (thru the influence of his father-in-law, Lord Abinger); solicitor-general; attorney-general; and lord chancellor of Ireland and chancellor of the duchy of Lancaster. Thruout life he was a conservative Whig.

The other lawyers of this period who should be mentioned are Alexander Weddenburn (Lord Loughborough) (1733-

1805), who was lord chancellor from 1793 to 1801, was full of intrigues, obtained this high office by intrigue, and lost it to Lord Eldon in 1801 because of his intrigues; Edward Law (Lord Ellenborough) (1750-1818), who as chief justice of the King's Bench, succeeding Kenyon, showed great learning and integrity but was petulant and intolerant, opposed Romilly's reforms and all other changes, was a bigot and generally overrated;⁴⁷ John Singleton Copley (Lord Lyndhurst) (1772-1863), who was lord chancellor three different times following Lord Eldon, bore an unsullied name, and was a consistent Conservative, resisting reforms in Parliament; Thomas Denman (1779-1854), who followed Lord Tenterden as chief justice of the King's Bench and was an outstanding liberal, advocating the reform of the criminal law and showing the same independence on the bench which distinguished him at the bar; Charles Christopher Pepys (Earl of Cottenham) (1781-1851), who as lord chancellor made a most excellent judge tho he was an indifferent advocate; Bethel Richard Westbury (1800-1875), another lord chancellor who devoted himself to the improvement of legal education and the reform of divorce and land registry; Alexander James Edward Cockburn, a great advocate, a good chief justice, and a liberal who opposed the Judicature Acts; and James Parke (Lord Wensleydale) (1782-1868), who succeeded Holroyd as judge on the King's Bench, was removed with Alderson to the Exchequer in 1834 in order to strengthen the court, after his resignation was raised to a peerage so that he could hear appeals in the House of Lords, and who is known chiefly for his intense conservatism.

Period of Socialization. Only a few English lawyers in the Period of Socialization will be mentioned.

Selbourne (1812-1895). Roundell Palmer Selbourne's fame rests upon the Judicature Acts. He was part author of the Judicature Act of 1873 and responsible for its passage. He was a judge of high qualities and a very religious man. His father was a rector. He attended Rugby, Winchester, Trinity College, Oxford, and was a fellow of Magdalen College. After his call to the bar, he became queen's counsel, member of Parliament, solicitor-general, attorney-general, and lord chancellor. He opposed the Crimean War and the Second Opium

⁴⁷ Street, *Foundations of Legal Liability*, 286.

War with China, and he finally parted with Gladstone politically over Home Rule and the disestablishment of the Church of England. He published a hymn book and other religious books.

Pollock (1845-). Sir Frederick Pollock is a grandson of Sir Jonathan Frederick Pollock, at one time chief baron of the Exchequer. He was born in London, and after his call to the bar has spent his life as professor of law and law writer. He has taught in University College, London, Oxford University, and the Inns of Court; he has been editor of the *Law Quarterly Review*; but he is known chiefly for his authorship of textbooks on *Contracts* and *Torts* and *History of English Law* (in collaboration with Maitland). He is a man of great learning and progressive ideas, and perhaps the greatest living English jurist.

Other lawyers of this period were Charles Russell (Russell of Killowen) (1832-1900), who was counsel for Great Britain in the Behring Sea Controversy, took Lord Herschell's place in the Venezuelan Arbitration, and was chief justice of the King's Bench; Joshua Williams (1813-1881), a conveyancer, professor of law and author of textbooks on property; and Frederick William Maitland (1850-1906), another conveyancer and professor of law (at Cambridge) who is famous as a jurist and historian.

CHAPTER XVI

GREAT LAWYERS OF THE UNITED STATES

THE United States has no reason to be ashamed of the great lawyers it has produced. The legal history of the United States is short. It covers a period of only about a century and a half. Yet during that time enough great lawyers have appeared to make any nation proud, and the memories of many of them will be cherished as long as this nation shall endure.⁴⁸

Chief Justices. Some of the great lawyers of the United States have been chief justices of the Supreme Court of the United States, a tribunal which in dignity and importance has no superior on earth. Not every one of the chief justices has been a lawyer of the first rank, but among the entire number there is not one who should be condemned to oblivion for his mediocrity. In all there have been ten chief justices, counting J. Rutledge (1739-1800) given a recess appointment in 1795 and not confirmed by the Senate. Of these by far the greatest was John Marshall. We shall briefly refer to each one in the order in which he held office.

Jay (1745-1829).⁴⁹ John Jay was the first chief justice of the United States Supreme Court. He was appointed by Washington, who always tried to exercise a wise judgment in his appointments; held office from 1789 to 1795; and was re-appointed by John Adams in 1800 but declined the appointment. He was born in New York; was descended from French Huguenots; studied law in an office; was acquiring a good practice when he was drawn into politics; was a delegate to the First Continental Congress; was the author of addresses to the People of Great Britain, to the People of Canada, and to the People of Ireland; prepared the bill of rights of New York and the constitution of New York; was chief justice of New York; was sent to Congress; was sent as a diplomat to Spain to borrow a million dollars and to get the freedom of the Mississippi River; with Franklin and Adams negotiated the Treaty of Peace; was special envoy to Great Britain; and resigned the chief justiceship to become

⁴⁸ Beveridge, *Life of John Marshall*; Warren, *Supreme Court in United States History*; Carson, *The Supreme Court of the United States*; Lewis, *Great American Lawyers*.

⁴⁹ 13 *Green Bag* 1; 6 *Col. L. Rev.* 289.

governor of New York. He was not a member of the Federal Convention, but contributed five papers to the *Federalist*, taking the position that the geographical divisions of the United States were like counties, which showed that he was an ultra-federalist. He was not profoundly learned in the law, but he was a statesman, and a man whose character was above reproach. Of him it was said that "when the judicial ermine touched his shoulders it touched nothing not as white as itself". One of his principal decisions was *Chisholm v. Georgia*.⁵⁰ It was fitting that a man of his character should be first chief justice of the Republic.

Ellsworth (1745-1807).⁵¹ Oliver Ellsworth was the third chief justice appointed by Washington, and held office from 1796 to 1800. He was in many respects the opposite of Jay. He was an extreme localist and states-rights man, and was opposed to a federal government; but supported it after it was adopted. He was slow and ponderous, but dignified, conscientious, and courageous. He was sent as one of three envoys to France in 1800, but resigned because he was not fitted for diplomacy. His decisions are of no importance. He was born in Windsor, Conn.; graduated from Princeton; read law and was admitted to practice; was a delegate to the Continental Congress; was a judge of the Superior Court of Connecticut; and was a member of the Federal Convention. He fought for the recognition of the states and our dual form of sovereignty; urged the compromise between the small and large states; but was absent the last day of the convention so that he did not sign the Constitution. He was the author of the First Judiciary Act (1789), which many think required the judges unconstitutionally to sit on circuit.

Marshall (1755-1835).⁵² The fourth chief justice was John Marshall, who was appointed by John Adams on January 31, 1801, and presided as chief justice until 1835. This was the longest, the most honorable, and the most successful judicial career that any man in the United States has ever had. Marshall was born in Germantown, Fauquier County, Va. His paternal grandfather was a Welshman. His father was associated with Washington under Lord Fairfax. As a boy

⁵⁰ 2 *Dallas* 419.

⁵¹ 13 *Green Bag* 503.

⁵² 13 *Green Bag* 53, 157, 213; 33 *Am. Rev.* 1; 34 *Am. L. Rev.* 550; 23 *Case and Com.* 809; Beveridge, *Life of John Marshall*.

Marshall delighted in sports. This gave him health. He was not studious, but was full of day-dreams. He studied with Monroe under a clergyman and later under his father. He was a lieutenant in militia during most of the Revolutionary War, and was with Washington at Valley Forge, where because of his bouyancy of spirit he was of invaluable assistance in keeping up the morale of the army. He began to attend law lectures under Wythe at William and Mary College in 1779 until he met and married Mary Ambler. He was admitted to the bar in 1780; became a member of the lower house of Virginia in 1782; supported the Federal Constitution in 1788 with Madison against Henry, Mason, and Grayson; argued the famous British debt case before the Circuit Court of the United States in opposition to Henry in 1796; defended the Jay Treaty; argued the case of *Ware v. Hylton*⁵³ before the Supreme Court (his only case); declined the attorney-generalship of the United States; accepted a mission to France with C. C. Pinckney and Gerry, where he snatched the laurels from Talleyrand; became a member of Congress, at the solicitation of Washington; accepted the office of secretary of state; and then became chief justice. Until near the close of his term he dominated all his associates upon the supreme bench. Unlike Mansfield he wrote long opinions, but they were lucid and convincing, and in them he laid the foundations of our government. He was neither an extreme states-rights man nor an extreme federalist; he thought that the federal government was a federation rather than a league of states, and the states more than mere administrative units, and he established this proposition as a part of our constitutional law by holding that our Constitution was a constitution rather than a compact and that the nation was sovereign within its sphere the same as the states were within their spheres.⁵⁴ He also settled the supremacy of the Supreme Court, not only over the other branches of the federal government,⁵⁵ but over the courts of the states.⁵⁶ By his hand the framework of our government was moulded and shaped into complete form. On Constitutional questions where there were no precedents to guide him he was never equaled by any other judge living or dead.

⁵³ 3 Dallas 199.

⁵⁴ *McCullough v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1.

⁵⁵ *Marbury v. Madison*, 1 Cranch 137.

⁵⁶ *Cohens v. Virginia*, 6 Wheat. 264.

He was the greatest judge and perhaps one of the two greatest constitutional lawyers the United States has ever produced. He was a soldier of distinction, a legislator of power, a diplomat of skill, a historian of accuracy, a statesman of enlightenment and patriotism, a magistrate of dignity, a judge of profundity and compelling, irresistible logic, and a man whose character commanded respect and obedience.

Taney (1777-1864).⁵⁷ John Marshall's successor and the fifth chief justice of the Supreme Court was Roger B. Taney, who was appointed by Andrew Jackson and presided for another long period from 1836 to 1864. Taney was an experienced trial lawyer, and probably entitled to higher rank as a justice than ordinarily given. He was born in Maryland and was a Catholic, and procured his education at Dickinson College and in the law office of Jeremiah T. Chase. He practiced law in Fredericktown against Pinckney, Martin, and other great lawyers of the day. In 1823 he moved to Baltimore and came into competition with Wirt. In 1827 he became attorney-general of Maryland, and in 1831 attorney-general of the United States under Jackson. He was nominated for the secretaryship of the treasury, but the nomination was rejected because of his opposition to the United States Bank. In the same way a nomination for justice to take Duvall's place was not confirmed. But when he was nominated for chief justice on Marshall's death he was confirmed, tho opposed by Clay. He was a strict constructionist and technical, but did not undo the work of Chief Justice Marshall so far as it related to the fundamental characteristics of our government. The one spot on his record was the "Dred Scott"⁵⁸ decision. In correcting Marshall's "Dartmouth College"⁵⁹ decision he did an admirable piece of work. His judicial style was commendable. In character he was a man of the highest integrity, simplicity, and purity of life.

Chase (1808-1875).⁶⁰ The sixth chief justice was Salmon P. Chase. He was appointed by Lincoln, who generously overlooked his personal affronts and political disloyalty, in order to appoint a strong man on the supreme bench. Chase was born on a farm in Cornish, N.H.; graduated at Dart-

⁵⁷ 22 *Green Bag* 149; 46 *Am. L. Rev.* 1; 18 *Yale L. Jour.* 10.

⁵⁸ 19 *How.* 393.

⁵⁹ 4 *Wheat.* 518.

⁶⁰ 7 *Green Bag* 313.

mouth; studied law under William Wirt; was admitted to the bar and practiced law at Cincinnati; became a leader of the anti-slavery men; entered the United States Senate, where he fought the Kansas-Nebraska Bill; became governor of Ohio; re-entered the United States Senate in 1861, but resigned to become secretary of the treasury under Lincoln; and was chief justice of the United States from 1864 to 1873. As a financier he ranks with Robert Morris and Alexander Hamilton. He was the author of the Legal Tender Acts, and as chief justice declared his own acts unconstitutional. His opinions were mostly on questions of international law and prize cases, but he rendered one important constitutional decision, *Texas v. White*,⁶¹ in which he established the proposition that our government is an indestructible union of indestructible states by holding that the seceding states had never legally been out of the Union. He presided with fairness over the impeachment trial of President Johnson. He filled the position of chief justice well, but he could not drop his political intrigues, and still sought the presidency.

Waite (1816-1888).⁶² The seventh chief justice was Morrison R. Waite. He was appointed by U. S. Grant, presided from 1874 to 1888, and after Marshall was one of our greatest chief justices. He was born in Lynn, Conn., and was a descendant of Thomas Waite, who signed his name to the death warrant of Charles I. He graduated from Yale; studied law in his father's office; practiced law in Maumee City and Toledo, Ohio; became a leader of the Ohio bar, tho his experience as a trial lawyer was somewhat narrow; and was one of the counsel of the United States before the Geneva Arbitration Tribunal. While he was chief justice, the Supreme Court passed on the "War Amendments", and established the principles of constitutional law upon the regulation of the railways, interstate commerce, public callings, polygamy, presidential removal from office, Legal Tender Acts, liquor traffic, repudiation of state debts, Chicago anarchists, and Chinese exclusion. Waite was a man of great intellectual and moral endowments, impartial in Reconstruction days, and a model of deportment. No disorder or levity was ever attempted in his presence. He believed in restricting the extension of the powers of the federal government. While per-

⁶¹ 7 Wall. 700.

⁶² 15 Green Bag 223; 22 Am. L. Rev. 301.

haps not as great a justice as Samuel F. Miller, with whom he was associated, he was one of the greatest of the judges who have sat upon the supreme bench. One of his great opinions was rendered in the case of *Munn v. Illinois*.⁶³

Fuller (1833-1910).⁶⁴ The eighth chief justice was Melville W. Fuller. He was appointed by Cleveland and presided from 1888 to 1910. He was pre-eminent at the bar of the Middle West, was fluent in speech, and ready with the pen, but was not eminent as a judge. He was born in Augusta, Me.; graduated from Bowdoin and Harvard Law School; practiced for a short time in Augusta and thereafter in Chicago; was a member of the Venezuela Boundary Commission; and was one of the peace commissioners at The Hague. He wrote opinions in the case of *Pollock v. Farmers' Loan and Trust Co.*,⁶⁵ in which the income tax law was nullified; in the *Northern Securities Case*,⁶⁶ where a railway merger was held to violate the Sherman Anti-Trust Law; in the *Danbury Hatters' Case*,⁶⁷ where a labor union was brought within the condemnation of the Sherman Anti-Trust Law; in the case of *Inman v. So. Car. Ry.*,⁶⁸ where it was held that a railway cannot limit its liability for negligence; and in *Leisy v. Hardin*,⁶⁹ where the Iowa prohibition law was nullified under the original package doctrine.

White (1845-1921).⁷⁰ Edward D. White was the ninth chief justice. He was appointed chief justice by Taft in 1910 and held the office until 1921, but he had previously been appointed associate justice by Cleveland in 1894. He was born in La Fourche Parish, La.; was educated at Catholic colleges; served in the Confederate army; was justice on the Louisiana Supreme Court; and was United States senator at the time of his appointment by Cleveland. He dissented in the *Northern Securities Case*, but wrote the majority opinions in other trust cases. He was a man of simplicity and kindness. His legal knowledge was adequate. His judgments were wise and fearless. His commanding presence lent dignity to

⁶³ 94 U.S. 113.

⁶⁴ 22 *Green Bag* 437, 526; 44 *Am. L. Rev.* 751.

⁶⁵ 158 U.S. 601.

⁶⁶ 193 U.S. 197.

⁶⁷ *Loewe v. Lawler*, 208 U.S. 274.

⁶⁸ 129 U.S. 128.

⁶⁹ 135 U.S. 100.

⁷⁰ 23 *Green Bag* 102; 45 *Am. L. Rev.* 321.

the supreme bench. He in every way made a satisfactory record as chief justice.

Taft (1857-).⁷¹ The tenth and present chief justice is William Howard Taft. He was appointed by Harding in 1921. Perhaps no one who has ever presided over the Supreme Court has ever had a more versatile career and a wider preparation for his work. He was born in Cincinnati, Ohio. He is a son of Alphonso Taft, who was at different times secretary of war, United States attorney-general, and minister to Austria and to Russia. William H. Taft graduated from Yale in 1878, second in his class, and from the Cincinnati College of Law in 1880. Soon thereafter he began to hold office, and before his appointment to the Supreme Court he had held the following offices, one after another: assistant prosecuting attorney, collector of internal revenue, judge of Superior Court of Ohio, solicitor-general of the United States, United States circuit judge, president of the United States Philippine Commission, secretary of war, president of the United States, and professor of law at Yale University. Chief Justice Taft is interested in the reform of federal legal procedure so as to make it conform so far as possible with the modern English legal procedure, and if the Supreme Court is clothed by Congress with the requisite power it is to be hoped that any reactionary influences in the Supreme Court will not be strong enough to defeat the carrying out in detail of Chief Justice Taft's purpose.

Associate Justices. Among the associate justices who have sat upon the supreme bench there have been at least three of such commanding ability and influence that some special reference to them should be made. They are justices Story, Miller, and Holmes.

Story (1779-1845).⁷² Joseph Story was an associate justice of the United States Supreme Court from 1811 to 1845. The larger part of this time Marshall was chief justice, and Story fell under the sway of Marshall's genius, but this in no way detracts from Story's reputation. He was a great judge and fitted to be associated with the great Marshall. He was born at Marblehead, Mass.; graduated from Harvard in 1798; began the practice of law at Salem in 1801; was sent to the

⁷¹ 20 *Green Bag* 337; 93 *Central L. Jour.* 93.

⁷² 1 *Green Bag* 12; 9 *Green Bag* 49; 16 *Case and Com.* 213.

legislature in 1805 as a Republican (Democrat); became a member of Congress in 1808; and was appointed associate justice by Madison in 1811. In 1829 he also became Dane professor of law at Harvard. He was the author of textbooks on the subjects of bailments, constitutional law, conflict of laws, and equity, all of which were learned treatises and received high rank in England as well as the United States. Justice Story, while on the supreme bench, did for the admiralty law of the United States a work comparable with the work of Lord Stowell for the admiralty law of England. Justice Story is entitled to be ranked as one of our best law teachers, one of our best law writers, and one of our best judges.

Miller (1816-1890).⁷³ Samuel F. Miller was associate justice of the United States Supreme Court from 1862 to 1890. During most of this time Morrison R. Waite, one of our greatest chief justices, presided over the Supreme Court, but many regard Miller as the leading member of the court while he was on it, and some regard him as second in ability only to Marshall himself. He was born in Kentucky and practiced medicine for ten years, but then he began to take part in debates, got interested in the law, read it secretly, was admitted to the bar, and began to practice law. He moved to Iowa in 1850, and became an ardent anti-slavery advocate and Republican leader in Iowa. He emancipated his own slaves. At the time of his appointment on the Supreme Court he had no national reputation as a lawyer, but Lincoln appointed him nevertheless, and subsequent events vindicated Lincoln's judgment. Miller's work in construing the slavery amendments is comparable to that of Marshall in construing the main Constitution. He was like Mansfield in that he was wont to sweep away precedents that justice might prevail. Some of his great opinions were rendered in the *Slaughter House Cases*,⁷⁴ *Hepburn v. Griswold*,⁷⁵ *Loan Ass'n v. Topeka*,⁷⁶ *United States v. Schurz*,⁷⁷ and *In re Neagle*.⁷⁸

⁷³ 17 *Yale L. Jour.* 422; 94 *Central L. Jour.* 187; 10 *Am. Bar Assn. Jour.* 406.

⁷⁴ 16 *Wall.* 36.

⁷⁵ 8 *Wall.* 603 (dissent).

⁷⁶ 20 *Wall.* 655.

⁷⁷ 102 *U.S.* 378.

⁷⁸ 135 *U.S.* 1. See also his dissent from the doctrine of the *Dartmouth College Case* in *Washington University v. Rouse*, 8 *Wall.* 439, another instance of where his minority position was in the course of time to become the majority position of the Supreme Court.

Holmes (1841-).⁷⁹ The greatest judge who has sat upon the supreme bench since Miller is Oliver W. Holmes, Jr. Chief Justice Taft has called him "the most brilliant and learned member" of the Supreme Court at the present time. He was appointed associate justice by Roosevelt in 1902 and is still sitting upon the bench. He is a son of the essayist; was born in Boston; graduated from Harvard and the Harvard Law School; and served in the Civil War, where he was wounded at Ball's Bluff, Antietam, and Fredericksburg. After the Civil War he practiced law in Boston and for three years was the editor of the *American Law Review*. In 1882 he became professor of law at Harvard, and in that year his judicial career also began. He was associate justice of the Massachusetts Supreme Court from 1882 to 1899, and chief justice from 1899 to 1902 when he was appointed to the United States supreme bench. Justice Holmes has published an edition of Kent's *Commentaries*, his *Collected Papers*, and *The Common Law*, a book recognized on both sides of the Atlantic as a legal masterpiece. Justice Holmes is one of the greatest jurists this country has ever had. He is a master of legal philosophy as well as legal history, yet does not forget the practical needs of the day; and is the possessor of a literary style, full of wise maxims, sententious summaries, and pithy brocards, worthy of his distinguished father. He has had an open-minded progressive viewpoint and has done as much as any other single man in the United States towards the socialization of the law. He has tried to "conserve the (other) rights of men as well as those of property". Some of his best known opinions are found in the cases of *Noble State Bank v. Haskell*,⁸⁰ *Schenck v. United States*,⁸¹ *Lockner v. New York*,⁸² and *Adair v. United States*.⁸³ He is one judge who has thought thru the general truths of life, has framed a system of legal ideas, and in his constitutional decisions recalls us to the traditions of Marshall. He is known wherever the common law is studied. Honorary degrees have come to him from Amherst, Williams, Yale, Harvard, Berlin, and Oxford.

⁷⁹ 29 *Harv. L. Rev.* 601, 702; 10 *Ill. L. Rev.* 617; 7 *Am. Bar Assn. Jour.* 359.

⁸⁰ 219 *U.S.* 104 (police power).

⁸¹ 249 *U.S.* 47 (sedition).

⁸² 198 *U.S.* 45 (dissent).

⁸³ 208 *U.S.* 161 (dissent).

State Judges. There have been a great many state judges of outstanding importance. We shall give short accounts of only Kent, Cooley, Shaw, Dillon, Mitchell, and Cardozo. There are many others who have many claims for recognition but the nature of this treatise will not permit of it herein.

Kent (1763-1847).⁸⁴ James Kent was one of the greatest United States lawyers. He was born in Fredericksburg, N.Y. He graduated from Yale in 1781, and was one of the founders of Phi Beta Kappa. He began practice in Poughkeepsie in 1785; had two terms in the New York legislature; was professor of law in Columbia from 1793 to 1797; was recorder of New York for one year; became judge of the state Supreme Court in 1798; was made chief justice in 1804; was chancellor of the state from 1814 to 1823; and then terminated his judicial career and again became professor of law and continued as such until his death. He published his *Commentaries on American Law* between 1826 and 1830. If he had remained on the bench these commentaries would probably never have been written. It is interesting to note that most of the great law textbooks have been written by law teachers. William Wirt urged Monroe to appoint Kent upon the Supreme Court, and in spite of the fact that Kent differed from Monroe in politics Monroe might have appointed him had not Smith Thompson finally accepted an appointment already tendered to him. It is too bad that politics were not disregarded in the first place, because Kent was singularly fitted for the supreme bench and was entitled to the honor.

Shaw (1781-1861).⁸⁵ Lemuel Shaw was born in Barnstable, Mass.; graduated from Harvard; was first admitted to the New Hampshire bar and later to the Massachusetts; was a member of the Massachusetts legislature and state senator for years; and was chief justice of the Massachusetts Supreme Court from 1830 to 1860. He opposed the passage of the Fugitive Slave Law but upheld its constitutionality. He defeated the attempt to lower the salaries and to abolish life tenure for judges in Massachusetts. Many notable opinions are credited to him, and he helped to settle many of the principles of law. This is especially true with reference to equity, water rights, and carriers. He was one of our greatest state judges.

⁸⁴ 17 *Yale L. Jour.* 311, 553; 7 *Am. Bar Assn. Jour.* 662.

⁸⁵ 1 *Green Bag* 89.

Cooley (1824-1898).⁸⁶ Thomas M. Cooley was born at Attica, N.Y.; removed to Michigan in 1843 and was admitted to the bar in 1846; was reporter of the supreme court in 1858; was professor of law in the University of Michigan from 1859 to 1885; was justice of the Michigan Supreme Court from 1864 to 1885; and was a member of the Interstate Commerce Commission under Cleveland. As a result of his law-teaching he published textbooks on *Constitutional Limitations*, *Taxation*, and *Torts*, all books of the first rank. As a judge he was in the same class with Chancellor Kent and Chief Justice Shaw. As a law writer he was in a class with Story. As a law teacher he gave the Michigan Law School a reputation all over the Middle West.

Dillon (1831-1914).⁸⁷ John F. Dillon was born in New York state, but in early life removed to Iowa with his parents. He graduated in medicine when about twenty, and, after deciding to study law, ran the business of a druggist while doing so in order to support a widowed mother. He was admitted to the bar in 1852, became prosecuting attorney, and soon enjoyed one of the largest law practices in the state. Thereafter he held the office of district judge, the office of chief justice of the Supreme Court of Iowa, and the office of federal circuit judge. Later he went into practice in New York City, became general counsel for the Union Pacific and for the Western Union, for three years was professor of law in Columbia University, and was honored with the presidency of the American Bar Association. He was the author of Dillon on *Municipal Corporations*, a legal classic, and founded and edited the *Central Law Journal*. At the time he lived there were not in the United States over three jurists his peers.

Mitchell (1832-1900).⁸⁸ William Mitchell was born in Ontario; was educated at Jefferson College, Pa.; moved to Winona, Minn., and began the practice of law there in 1857; was a member of the state legislature one term; became district judge in 1874; and began his judicial career as a justice of the Minnesota Supreme Court in 1881, an office which he held until shortly before his death. He was a Democrat, and was continued in office by the sufferance of the Republicans,

⁸⁶ *Mich. L. Rev.* 309.

⁸⁷ 23 *Green Bag* 447; 25 *Am. L. Rev.* 969; 45 *Am. L. Rev.* 588.

⁸⁸ 4 *Green Bag* 171; 4 *Minn. L. Rev.* 377.

who recognizing his outstanding ability either also nominated him or put no opposition candidate in the field, until his last campaign, when for political purposes they placed another candidate in the field against him, and the party-trained and political-minded voters voted Justice Mitchell out of office. The late Dean Ames declared that this was a national calamity. William Mitchell's record upon the Minnesota supreme bench entitles him to rank with the best of our state judges.

Cardozo (1870-).⁸⁹ Perhaps the greatest living state judge is Benjamin Cardozo. He was born in New York City; procured the degrees of B.A. and M.A. from Columbia University; was admitted to the bar in 1891, and has been a judge of the Court of Appeals of New York since 1914. He is the author of the *Nature of the Judicial Process*, *Growth of Law*, and *Jurisdiction of the New York Court of Appeals*, and is active in the work of the American Law Institute.

Practitioners. Of the great lawyers, whose legal reputation rests upon their work as practitioners at the bar instead of upon work as professors of law or upon work upon the bench, the following at least are entitled to mention:

Hamilton (1757-1804).⁹⁰ Alexander Hamilton was born on the island of Nevis in the West Indies, a natural son of James Hamilton, a Scotchman, and Rachael Levine, who had separated from her husband, a Dane. His mother's relatives sent him to New York to be educated in 1772. He championed the cause of the colonies when eighteen years old, wrote masterly arguments in refutation of other publications, and was lieutenant-colonel to General Washington. He married a daughter of Philip Schuyler; practiced law in New York; was a member of the Continental Congress, the Annapolis Convention, and the Constitutional Convention; was joint author of the *Federalist* with Madison and Jay; was a member of Congress for one term, and was secretary of the treasury from 1789 to 1795. He was responsible for the funding of the public debt, the federal assumption of the state debts, and the national bank. In 1795 he declined an appointment as chief justice. He argued the carriage tax case⁹¹ before the Supreme Court, and in his argument for a national bank

⁸⁹ 26 *Green Bag* 97.

⁹⁰ 23 *Case and Com.* 114.

⁹¹ *Hylton v. United States*, 3 *Dallas* 171.

was the author of the doctrine of "implied powers". Burr's final quarrel with him won over his support of Jefferson. His death at the hands of Burr was chiefly responsible for the abolition of the practice of dueling. He was a leader of leaders, not of the rank and file, and only Marshall had more to do than he with the foundations of our federal government. For sheer intellectual power probably he was never surpassed by any other lawyer in the United States.

Pinckney (1764-1822).⁹² William Pinckney was one of the great orator lawyers of the age of Wirt, Martin, Hopkinson, Clay, and Webster. He was born at Annapolis, Md. and was the son of a Tory, but he sided with the patriots and was a member of the convention which ratified the Constitution. Before practicing law he tried medicine. One after another he held the offices of state attorney-general, United States minister to England, United States minister to Russia, senator, and United States attorney-general (under Madison). He fought in the battle of Blandenburg and was wounded in 1814. He argued many cases before the United States Supreme Court, and was largely responsible for the development of international law and admiralty law in the United States. He appeared in the *Dartmouth College Case* (tho late),⁹³ *McCullough v. Maryland*,⁹⁴ *Cohens v. Virginia*,⁹⁵ and *Amiabele Isabella*.⁹⁶ In 1816 he offered to let Story take over his practice in Baltimore when it was paying him \$21,000 a year, but Story decided to remain on the bench, tho his salary at the time was only \$3,500. He was at that time the head of the bar of the United States. He was foppish, vehement, but absolutely overwhelming. He had few, if any, equals, either in argument or eloquence, especially when he was talking before an audience made up partly of ladies.

Clay (1777-1852).⁹⁷ Henry Clay was another great orator, but he is better known as a statesman than a lawyer. He is noted for his arguments for protection, for his support of the Missouri Compromise of 1820 and his authorship of the Compromise of 1850, and for his candidacy for the presidency. However, he was also a great lawyer, argued many

⁹² 15 *Green Bag* 301; 23 *Case and Com.* 87.

⁹³ 4 *Wheat.* 518.

⁹⁴ 4 *Wheat.* 316.

⁹⁵ 6 *Wheat.* 264.

⁹⁶ 6 *Wheat.* 1.

⁹⁷ 37 *Am. L. Rev.* 1.

important cases before the Supreme Court,⁹⁸ and declined an appointment by Adams as justice of the Supreme Court. He was the son of a Baptist clergyman and was born in the Slashes, Hanover County, Va. In succession he was clerk in the High Court of Chancery of Richmond, practitioner at Lexington, Ky., in the Kentucky constitutional convention and the lower house of Kentucky, congressman, secretary of state under Adams, and United States senator (1831-1842, 1849-1852). He defended Aaron Burr, prevented the overthrow of the common law in Kentucky, tried to prohibit slavery in Kentucky, and was one of the negotiators of the Treaty of Ghent.

Webster (1782-1852).⁹⁹ Daniel Webster has the reputation of being the greatest orator the United States has produced. He was perhaps one of the two greatest constitutional lawyers of the United States, and many of the arguments used by Marshall were first made by Webster. He was born in Salisbury, now Franklin, N.H.; graduated from Dartmouth in 1801; was admitted to the bar in 1805; practiced law in Boscawen till his father's death and then in Portsmouth, and achieved distinction; represented New Hampshire in Congress from 1812 to 1817; in 1817 removed to Boston and entered upon the largest practice in the United States; represented Massachusetts in Congress from 1822 to 1826 and in the Senate from 1827 to 1841; was secretary of state in 1841 (Harrison), but after negotiating the Ashburton Treaty returned to practice; and was again in the Senate from 1845 to 1850. In the *Dartmouth College Case*¹⁰⁰ he argued that a charter is a contract and that the "law of the land" does not mean any law the legislature may pass. In *McCullough v. Maryland*¹⁰⁰ he argued that the power to tax is the power to destroy. In *Gibbons v. Ogden*¹⁰⁰ he argued that the Union is a federation and not a league. In the *Girard Will Case*¹⁰¹ he argued that a will against Christianity is void. In the *Passenger Tax Case*¹⁰² he argued that the states have no power to impose a tax upon foreigners entering the United

⁹⁸ *Osborne v. United States Bank*, 9 Wheat. 738; *Greene v. Biddle*, 8 Wheat. 1; *Briscoe v. Bank of Ky.*, 11 Pet. 257; *Houston v. Bank*, 6 How. 486.

⁹⁹ 13 *Green Bag* 508; 23 *Case and Com.* 97; 35 *Am. L. Rev.* 801; 13 *Yale L. Jour.* 366.

¹⁰⁰ *supra*.

¹⁰¹ 3 *Wall. Jr.* 263.

¹⁰² *Smith v. Turner*, 7 *How.* 283.

States. In Congress he at first opposed, then supported the tariff laws, and New England sold her ships and went to manufacturing. He supported the Compromise of 1850. He ought to have been appointed to the Supreme Court. That would have been an appropriate way for him to round out his career, and he was the one man in the United States who was the appropriate successor to John Marshall, but a democracy has yet to learn how to choose its greatest men for positions of leadership.

Lincoln (1809-1865).¹⁰³ Abraham Lincoln is universally ranked as one of our few greatest orators, statesmen, and presidents. He is also entitled to be ranked among our greatest lawyers. This, not so much for the big cases in which he appeared, altho he appeared in some big cases, or for the extent of his practice, altho he had an extensive practice (since neither gave him a national reputation), as for the uniqueness of his legal career, and for his legal and constitutional arguments in his debates with Douglas, his Cooper Union speech, and his inaugural addresses. The uniqueness of his legal career appears first in his preparation of himself for the practice of the law by self-instruction in both general education and legal education, an example which has been an inspiration for all poor but ambitious young men since his time; second, in the moral and intellectual standards which he maintained in the conduct of cases, which have had no small influence in raising the moral and intellectual standards of the entire legal profession in the United States; and, third, in his demonstration that the principles of Christianity have more relation to the administration of justice and the other problems of organized social life than they do to the complicated statements of Christian doctrine which characterize the articles of belief and confessions of faith of the churches. He was born in Kentucky; lived in young manhood in southern Indiana and for the rest of his life in central Illinois except when in Washington; was storekeeper, postmaster, deputy surveyor, captain in the Black Hawk War, member of the Illinois legislature, congressman, leading practitioner in Illinois, and sixteenth president of the United States; and was the author of the Gettysburg Address, the Emancipation Proclamation, and other orations and immortal

¹⁰³ 23 *Green Bag* 325; 50 *Am. L. Rev.* 781; Nicolai and Hay's *Life of Lincoln*, etc.

documents. We have had few trial lawyers in the United States who were his equal, but he was never given a national opportunity either before juries or before courts. Yet his work in Illinois and his arguments in other than lawsuits demonstrates that he was in ability one of the greatest lawyers of the United States, and that if he had had the same opportunity he would have made a record equal to that of Webster or Marshall. Except for some further study in middle life, his general education was obtained from reading the *Bible*, *Aesop's Fables*, *Robinson Crusoe*, *Pilgrim's Progress*, Shakespeare, Weem's *Life of Washington*, and a history of the United States, and his legal education from reading Blackstone's *Commentaries*.

There have been many other great practitioners, judges, and law teachers and writers in the United States, but the limits of this treatise forbid any more than a mere mention of their names. Among those who must be thus recognized at least are Patrick Henry (1736-1799), noted for his eloquence and his "liberty or death" speech; William Wirt (1772-1834), celebrated for his speech in the prosecution of Aaron Burr; Joseph Hopkinson (1770-1842) of Pennsylvania and Luther Martin (1744-1826) of Maryland, both of whom could hold their own with any of the great lawyers of their day; Rufus Choate (1799-1859) of Massachusetts, William M. Evarts (1818-1901) of New York, Jeremiah S. Black (1810-1883) of Pennsylvania, and Joseph H. Choate (1832-1917) of New York and a cousin of Rufus Choate, all leaders of the bar of the United States in their day; Elihu Root (1845-), the head of the bar of the United States today and an advocate of the reform of legal procedure; Charles Doe (1830-1896), a great judge of New Hampshire who is noted for what he did for legal procedure in that state; Isaac P. Christiancy (1812-1890) and James V. Campbell (1823-1890), two judges associated with Judge Cooley and almost his equal; John B. Winslow (1851-1920), a great judge of Wisconsin; Learned Hand (1872-) of New York, probably the greatest federal district judge of the present time; David Dudley Field (1805-1894), a lawyer of wide reputation and author of the New York codes of civil and criminal procedure of 1848-1850, the Field penal, civil, and political codes of 1857-1865, and a draft outline of an international code (1873); Stephen Field (1816-

1899), a brother of David Dudley Field and Cyrus Field and largely responsible for the extension of the meaning of the "due process clause" of the fourteenth amendment; Christopher C. Landell (1826-1906), author of the Landell, or case, method of instruction; James Barr Ames (1846-1910), the greatest legal research man of the United States; John H. Wigmore (1863-), an eminent law writer and author of Wigmore on *Evidence*; Roscoe Pound (1870-), probably the greatest jurist and legal philosopher of the United States; and John Bassett Moore (1860-), an authority on international arbitration and a member of the World Court.

PART FOUR

LAW BOOKS AND THEIR USE

CHAPTER XVII

LAW BOOKS

THE Anglo-American law of the past and the materials out of which, along with the facts of life, the Anglo-American law of the future will be made are found in law books. These books may, therefore, be called the repositories of the law. In the matter of authority the materials in these repositories of the law vary in importance. Some are of almost controlling importance. Others are only of persuasive importance. Still others are of importance only as helps for finding the other materials. Consequently it has become customary to classify law books according to their authority, and this gives us three main classes of law books: (I) Books of Primary Authority, (II) Books of Secondary Authority, and (III) Key Books. Books of primary authority include (A) Statutes, and (B) Judicial Decisions; and Statutes include (1) Constitutions, (2) Treaties, and (3) Statutes proper. Books of secondary authority include (A) Digests, (B) Encyclopedias, (C) Text-books, (D) Law Dictionaries, (E) Legal Periodicals, and (F) Annotations to Statutes and Cases. Key Books include (A) Indexes, (B) Notes on Reported Cases, (C) Tables of Cases, and (D) Citators. Various lists¹⁰⁴ of law books have been compiled and published—all essentially alike, but the list prepared by Edmund M. Morgan is best adapted for student use, because it is accompanied by a large but succinct amount of explanatory material, and this list with Professor Morgan's accompanying explanations and with a supplementary list of state reports is the one now published in this study.

¹⁰⁴ Hicks, *Materials and Methods of Legal Research*; Lawyer's Coöperative Pub. Co., *Law Books and their Use*; Mason in *Brief Making*; Kiser, *Principles and Practice of Legal Research*; Morgan, *Introduction to the Study of Law*.

REPOSITORIES OF THE LAW¹⁰⁵By EDMUND M. MORGAN¹⁰⁶*Books of Primary Authority*

A. Statutes in the United States.

1. Constitutions.

- a. Constitution of the United States. Usually published in compilations of federal statutes, and frequently in compilations of state statutes. For example:

United States Revised Statutes (2d ed.), pp. 17-32.

U.S. Compiled Statutes, Vol. 10, p. 13062, Vol. 11 (Annotated).

Federal Statutes Annotated, Vols. 10, 11 (Annotated).

Barnes, Federal Code, pp. 23-38.

General Statutes of Connecticut, Revision of 1918, pp. 23-40.

Ohio General Code revised to 1921, Throckmorton, pp. v-xii.

- b. Constitutions of the several states. Usually the constitution of a state is published in the compilation of the statutes of that state. For example:

General Statutes of Connecticut, Revision of 1918, pp. 41-67.

2. Treaties.

Treaties of the United States with foreign nations and with the Indian tribes are contained in the U.S. Statutes at Large. They are also contained in the U.S. Treaty Series published by the Government Printing Office. The treaties to 1913 are to be found in the collection of William T. Malloy, issued in 1910 by the Government Printing Office, and the supplement thereto by Charles Garfield, issued in 1913.

3. Federal Statutes.

- a. United States Statutes at Large. These contain all acts of Congress arranged chronologically, treaties, concurrent resolutions, and proclamations of the President, as originally enacted or promulgated. At the close of each session of Congress the above-mentioned documents of that session are published by the Government.

- b. Revised Statutes of the United States. The first edition contains all acts of Congress of a general and permanent nature in force December 1, 1873. The second edition was published in 1878, and until 1901 was kept up to date by supplements issued periodically.

- c. Compiled Statutes of the United States. The 12 volumes originally issued contain all acts of Congress of a general and permanent nature in force January 1, 1915. A two-volume supplement brings the work down to March 4, 1919. These 12 volumes contain also extensive annotations to the statutes, which, of course, fall without the class of material characteristic of books of primary authority. A so-called "Compact Edition" contains in one volume the statutory

¹⁰⁵ Published by permission of Professor Morgan.

¹⁰⁶ Professor of law, Harvard University.

text found in the original 12 volumes, without annotations, and it has been brought to January 1, 1923, by a one-volume supplement. Supplements keeping the material up to date are published in the Federal Reporter.

- d. Federal Statutes Annotated. The second edition contains in 12 volumes all the acts of Congress of a general and permanent nature in force on January 1, 1916. Five annual supplements bring the work to January 1, 1923. Quarterly pamphlet supplements keep the text up to date. All these publications contain by way of annotations much material characteristic of books of secondary authority.
 - e. Barnes Federal Code. This contains the acts of Congress of a general and permanent nature in force December 31, 1918, classified and arranged as in the Revised Statutes of the United States. A one-volume supplement brings it down to January, 1923.
4. Statutes of the several states.
- a. Session Laws. After the close of each legislative session in any state, the enactments of the legislature during that session, arranged chronologically, are published by the state or under its authority. They are commonly called session laws, but in some states they are otherwise designated. For example, in Connecticut they are usually referred to as Public Acts, in Florida as General Acts, in Wisconsin as Session Laws.
 - b. Compilations, Consolidations, Revisions, Codes. At intervals in each state, the legislature provides for the rearrangement or restatement or both of all existing statutory enactments. In some instances the provision is merely for republishing the statutes in chronological order omitting repealed and obsolete enactments; in others it is for republication with arrangement according to subject-matter; in others for a rewriting and restating of the existing laws with needed amendments. In the last case the restatement is enacted by the legislature. In the others, the legislature usually merely authorizes the rearrangement of statutes then in force without alteration or amendment and makes the new publication only *prima facie* evidence of the law, as it exists in the previously enacted statutes. An example of the former is found in the Revised Laws of Minnesota, 1905; of the latter in the General Statutes of Minnesota, 1913. In some instances the restatement or revision of only a portion of the statutory law is provided for, as in the case of the New York Civil Practice Act, 1919.
5. Municipal Charters.

Frequently, and formerly always, these were merely acts of the legislature. Often they are now so-called Home Rule Charters, adopted by vote of the electors of the municipality.

6. Municipal Ordinances.

Ordinances passed by the legislative body of a municipality pursuant to valid authority given by its charter have the same effect within the municipality as do enactments of the state legislature within the state.

7. Regulations and Orders of Administrative Commissions and Officers.

These, when made pursuant to properly delegated authority, have substantially the effect of statutes, *e.g.*, Regulations and Orders of the State Board of Health of Minnesota.

8. Rules of Court.

For the conduct of litigation in the various courts, rules are promulgated by them which, within their proper sphere, have the force of an enactment of the legislature. They are usually published as an appendix to reports of decisions, and ordinarily they can be obtained in pamphlet form from the clerks of the respective courts.

B. Statutes in England.

1. Constitutions—None.

2. Treaties.

The treaties of Great Britain with other nations from 1829 to date are published in British and Foreign State Papers (112 volumes to 1922) and the treaties from 1892 to date in the Treaty Series.

3. Statutes.

a. The Statutes Revised. The second edition in 20 volumes contains in chronological order the live statutes from 1235 to 1900. An official publication.

b. Public General Statutes. These contain the statutes from 1901 to date. There is an official edition, and an unofficial Law Reports edition.

c. Chitty's Statutes of Public Utility. The first 16 volumes contain the statutes which the unofficial publishers deem of general importance through 1910; the 17th and 18th volumes, through 1916; and annual supplements, to date.

4. Statutory Rules and Orders.

These contain in 13 volumes the statutory rules and orders of general and permanent importance in effect December 31, 1903. Annual volumes bring and keep the work up to date.

5. Rules of Court.

C. Reports of Judicial Decisions in the United States.

1. Reports of Decisions of Federal Courts.

a. United States Supreme Court Reports.

1789-1900, Dallas, 4 volumes.

1801-1815, Cranch, 9 volumes.

1816-1827, Wheaton, 12 volumes.

1828-1842, Peters, 16 volumes.

1843-1860, Howard, 24 volumes.

1861-1862, Black, 2 volumes.

1863-1874, Wallace, 23 volumes.

1875 to date, United States Supreme Court Reports beginning with Volume 91. The volume issued October, 1923, is number 259.

Dallas and Cranch were unofficial reporters. Wheaton in 1817 was appointed official reporter, and since that date the decisions of the court have been reported by an official reporter. The reports from 1789 to 1874 inclusive are cited as volumes 1 to 90 United States Supreme Court Reports as well as by the name of the reporter. The reports since 1875 are not cited by the name of the reporters.

- b. United States Supreme Court Reporter. This is an unofficial publication reporting the decisions of the United States Supreme Court beginning with those in volume 106. From 3 to 5 volumes of the official reports are contained in one volume of the Reporter. Advance sheets report current decisions.
 - c. United States Supreme Court Reports, Lawyer's Edition. The 66 volumes of this unofficial publication contain all cases reported in the 259 volumes of the regular reports; and semi-monthly advance sheets report the current decisions. This publication contains much material properly belonging to books of secondary authority, *e.g.*, editorial head-notes, summaries of briefs of counsel, editorial annotations, tables of cases affirmed and reversed, etc.
 - d. Federal Cases. This is an unofficial reprint in 31 volumes of all published decisions of the United States Circuit Courts and of the United States District Courts from 1789 to 1879. It has almost entirely superseded the reports from which it is reprinted. The cases are arranged alphabetically and numbered consecutively. They are cited by title and number, rather than by title, volume, and page.
 - e. Federal Reporter. This contains all the published decisions of the United States Circuit Courts from 1880 to 1912, when they were abolished, of the United States District Courts from 1880 to date, and of the United States Circuit Court of Appeals from its organization in 1891, and of the Commerce Court.
 - f. Court of Claims Reports.
1855-1856, Devereux's Reports.
1863 to date, Court of Claims Reports.
 - g. Court of Customs Appeals Reports. The publication of decisions of this court began in 1910. Current decisions are published in the weekly pamphlet of Treasury Decisions.
 - h. Reports of Decisions of Courts of District of Columbia, the Territories, and Outlying Possessions of the United States. See below under Reports of Decisions of Courts of the Several States, etc.
2. Reports of Decisions of the Courts of the Several States, Territories, and Possessions of the United States.

- a. So-called Official Reports. A complete list of the reports of the courts of the several states and territories, the District of Columbia, Porto Rico, and the Philippine Islands will be found in Hicks, pp. 559-571; in *Law Books and Their Use*, published by the Lawyers' Coöperative Publishing Co., and Bancroft-Whitney Co.¹⁰⁷ * * * It is necessary only to mention that some of the earlier reports in some jurisdictions are by unofficial reporters, and are in such condensed or abbreviated form as to be of less value than current reports. An acquaintance with the system of courts in a jurisdiction is sometimes required in order to be able to distinguish the reports of inferior and intermediate appellate courts from those of courts of last resort.
- b. Unofficial Reports.

- (1) The Reporter System. This system reports all current decisions of all appellate courts of the United States, and some decisions of lower courts. These reports are usually published much in advance of the official reports. Weekly advance sheets are issued. All opinions of the courts in question are printed in full. The United States Supreme Court Reporter and the Federal Reporter have been noticed above. The other units of the system are shown below. They report the decisions of the courts of the jurisdictions named, beginning (unless otherwise stated) with page 1 of the indicated volume of the so-called official reports.

¹⁰⁷ The reports have been designated by number from the beginning in the states and territories of Alaska, Arizona, Arkansas, California, Colorado, Dakota, Florida, Hawaii, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Philippine Islands, Porto Rico, Rhode Island, Utah, Washington, West Virginia, and Wyoming. The following is a list of the other states with the names of the reporters by which their earlier reports have been designated:

Alabama: Minor, Stewart, Stewart and Porter, Porter, Alabama Reports, Alabama Appellate Court Reports.

Connecticut: Kirby, Root, Day, Connecticut Reports.

Delaware: Harrington, Houston, Marvel, Pennewill, Boyce, Houston's Criminal Reports, Delaware Chancery Reports, Harrington, W. W.

District of Columbia: Cranch (D.C. 1-5), Hayward and Hazelton, District of Columbia Reports, (D.C. 6 and 7), McArthur (D.C. 8-10), McArthur and Mackey (D.C. 11), Mackey (D.C. 12-21), District of Columbia Appeals.

Georgia: Charlton (T. U. P.), Charlton (R. M.), Dudley, Georgia Decisions, Georgia Reports, Georgia Appeals Reports.

Illinois: Breese (1 Ill.), Scammon (2-5 Ill.), Gilman (6-10 Ill.), Illinois Reports, Illinois Appeals Reports, Illinois Circuit Court.

Indiana: Blackford, Wilson (Superior Court), Indiana Reports, Indiana Appellate Reports.

Iowa: Morris, Greene, Iowa Reports.

Kentucky: Hughes, Kentucky Decisions (Sneed), Hardin, Bibb, Marshall (A. K.), Littell, Littell's Select Cases, Monroe (T. B.), Marshall (J. J.), Dana, Monroe (Ben.), Metcalf, Duvall, Bush, Kentucky Reports (78 to 204).

Louisiana: Martin, Martin (New Series), Louisiana Reports, Robinson, Louisiana Annual Reports, Louisiana Reports (104 to 156), Manning's Unreported Cases, McGloin's Court of Appeals.

- (a) Atlantic Reporter (begins 1885).
 Connecticut—Vol. 53.
 Delaware (Chancery)—Vol. 6.
 Houston, Vol. 7.
 Marvel, Vol. 1.
 Pennewill, Vol. 1.
 Boyce, Vol. 1.
 Maine—Vol. 77, p. 408.
 Maryland—Vol. 64.
 New Hampshire—Vol. 63, p. 446.
 New Jersey (Law)—Vol. 47, p. 349.
 (Equity)—Vol. 40, p. 345.
 Pennsylvania—Vol. 110.
 Rhode Island—Vol. 15.
 Vermont—Vol. 58.
- (b) Northeastern Reporter (begins 1885).
 Illinois (Supreme)—Vol. 114.
 Indiana (Supreme)—Vol. 102.
 (Appellate)—Vol. 1.
 Massachusetts—Vol. 139.
 New York—Vol. 99.
 Ohio—Vol. 43.
- (c) Northwestern Reporter (begins 1879).
 Dakota—Vol. 1.
 Iowa—Vol. 51.
 Michigan—Vol. 41.
 Minnesota—Vol. 26.
 Nebraska—Vol. 8, p. 294.
 Nebraska Commissioners' Decisions, Vol. 1.
 North Dakota—Vol. 1.
 South Dakota—Vol. 1.
 Wisconsin—Vol. 46.

Maine: Greenleaf (Maine, 1-9), Fairfield (Maine, 10-12), Maine Reports (13 to 123).

Maryland, Law: Harris and McHenry, Harris and Johnson, Harris and Gill, Gill and Johnson, Gill, Maryland Law Reports; Chancery: Bland's Chancery Reports, Maryland Chancery Reports. This court abolished.

Massachusetts: Massachusetts Reports (1-17), Pickering, Metcalf, Cushing, Gray, Allen, Quincy's Reports, Thatcher's Criminal Cases, Cushing's Contested Election Cases, Massachusetts Reports.

Michigan: Harrington's Chancery, Walker's Chancery, Douglass, Brown's Nisi Prius, Howell's Nisi Prius, Michigan Reports.

Mississippi, Law: Walker (Miss. 1), Howard (Miss. 2-8), Smedes and Marshall (Miss. 9-22), Mississippi Reports (23 to 135); Chancery: Freeman's Chancery, Smedes and Marshall's Chancery.

New Hampshire: Smith, New Hampshire Reports (N.H. 1-20), Foster (N.H. 21-31), New Hampshire Reports.

New Jersey, Law: Coxe, Pennington, Southard, Halsted, Green, Harrison, Spencer, Zabriskie, Dutcher, Vroom, Gummere; Chancery: Saxton, Green, Halsted, Stockton, Beasley, McCarter, Green, C. E. Stewart, Dickinson, Robbins, Buchanan, Stockton. (The volumes of the New Jersey Law and the New Jersey Equity Reports are designated from the beginning by number and by the names of the court reporters.)

- (d) Pacific Reporter (begins 1883).
 - Arizona—Vol. 1.
 - California (Supreme)—Vol. 64.
 - (Appellate)—Vol. 1.
 - Colorado (Supreme)—Vol. 7.
 - (Appellate)—Vol. 1.
 - Idaho—Vol. 2.
 - Kansas (Supreme)—Vol. 30.
 - (Appellate)—Vol. 1.
 - Montana—Vol. 4.
 - Nevada—Vol. 17.
 - New Mexico—Vol. 3.
 - Oklahoma (Supreme)—Vol. 1.
 - (Criminal Appeals)—Vol. 1.
 - Oregon—Vol. 11.
 - Utah—Vol. 3.
 - Washington—Vol. 1.
 - (Territory)—Vol. 2.
 - Wyoming—Vol. 3.
- (e) Southeastern Reporter (begins 1887).
 - Georgia—Vol. 79.
 - Georgia (Appellate)—Vol. 1.
 - North Carolina—Vol. 96.
 - South Carolina—Vol. 26.
 - Virginia—Vol. 82, p. 964.
 - West Virginia—Vol. 29.
- (f) Southern Reporter (begins 1887).
 - Alabama—Vol. 81.
 - Alabama Appellate—Vol. 1.
 - Florida—Vol. 23.
 - Louisiana—Vol. 39 (Annotated).
 - Mississippi—Vol. 64.

New York, Law: Coleman's Cases, Coleman and Caine's Cases, Johnson's Cases, Caine, Caine's Cases, Johnson, Anthon's Nisi Prius Cases, Yates' Select Cases, Cowen, Wendell, Hill, Denio, Lalor's Supplement to Hill and Denio, Edmond's Select Cases, Lockwood's Reversed Cases (Reprint 80 volumes, annotated, with digest, in 17 books); Chancery: Johnson, Hopkins, Paige, Edwards, Hoffman, Clarke, Sandford, Barbour (Reprint 38 volumes including Chancery Sentinel, annotated, with digest, in 7 books); Court of Appeals: Comstock, Selden, Kernan, New York Court of Appeals (A reprint of the New York Court of Appeals Reports has been made.) Court of Appeals: (containing Cases unreported in Regular Series), Howard's Appeal Cases, Keyes, Abbott, Selden's Notes, Transcript Appeals, Silvernail; Supreme Court Reports: Barbour, Lansing, Thompson and Cook, Hun, Silvernail, Appellate Division; Practice and Code Reports: Howard's Practice, Howard's Practice (N.S.), Code Reporter, Code Reports (N.S.), Abbott's Practice, Abbott's Practice (N.S.), Abbott's New Cases, New York City Court Reports, New York Civil Procedure, New York Civil Procedure (N.S.), New York Miscellaneous, New York Annotated Cases; Surrogate Court Reports: Bradford, Redfield, Tucker, Demarest, Connolly, Powers, Gibbons, Mills; Superior Court Reports: Hall, Sandford, Duer, Bosworth, Robertson, Sweeney, Jones & Spencer, Buffalo Superior Court (Sheldon's Reports); Common Pleas Reports: Smith (E.D.), Hilton, Daly; Criminal Reports: Wheeler's Criminal Cases, Rogers' City Hall Recorder, Parker's Criminal, Cowen's Criminal, New York Criminal.

(g) *Southwestern Reporter* (begins 1886).

Arkansas—Vol. 47.

Kentucky—Vol. 84, p. 202.

Indian Territory—Vol. 1.

Missouri (Supreme)—Vol. 89.

(Appellate)—Vol. 94 (also part of Vol. 93).

Tennessee—Vol. 85.

Texas—Vol. 66.

(Appellate)—Vol. 1.

(Civil Appeals)—Vol. 1.

(Criminal Reports)—Vol. 21.

(h) *New York Supplement* (begins 1888).

This reports the decisions of the lower courts of New York which are published in the following reporters and many not published in any of them. Commencing with volume 184 it publishes also decisions of the New York Court of Appeals.

Abbott—Vol. 23.

Appellate Division—Vol. 1.

Civil Procedure—Vol. 14.

Civil Procedure Reports, New Series—Vol. 1.

Bradbury's Pleading and Practice Reports—
Vol. 1.

Demarest's Surrogate—Vol. 6, p. 413.

Connolly's Surrogate—Vol. 1.

Gibbons' Surrogate—Vol. 1.

Power's Surrogate—Vol. 1.

Mills' Surrogate—Vol. 1.

Daly—Vol. 14, p. 497.

Hun—Vol. 48, p. 304.

Miscellaneous Reports—Vol. 1.

Criminal Reports—Vol. 6.

North Carolina: Martin, Taylor, Conference by Cameron and Norwood, Haywood, Carolina Law Repository, North Carolina Term Reports, Murphey, Hawks, Devereux's Law, Devereux's Equity, Devereux and Battle's Law, Devereux and Battle's Equity, Iredell's Law, Iredell's Equity, Busbee's Law, Busbee's Equity, Jones' Law, Jones' Equity, Winston, Phillip's Law, Phillip's Equity, North Carolina Reports. (In June, 1906, the Supreme Court of North Carolina made a rule requiring counsel in future to cite these reports by consecutive volume number.)

Ohio: Ohio Reports, Ohio State Reports, Ohio Appeals; Miscellaneous Ohio Reports: Tappan (Common Pleas), Wright (Supreme Court), Handy (Cincinnati Superior Court), Disney (Cincinnati Superior Court), Cincinnati Superior Court, Ohio Decisions Reprint, Ohio Decisions (Superior and Common Pleas), Ohio Nisi Prius, Ohio Nisi Prius (New Series), Ohio Circuit Decisions, Ohio Circuit Court Reports, Ohio Circuit Court Reports (New Series).

Pennsylvania: Dallas, Addison, Yeates, Binney, Sergeant and Rawle, Rawle, Penrose and Watts, Watts, Wharton, Watts and Sergeant, Pennsylvania State Reports; Miscellaneous Pennsylvania Reports: Ashmead, Brewster, Brightly, Browne, Clarke, Grant's Cases, Kulp, Miles, Monaghan, Parsons' Equity Cases, Pearson, Pennypacker, Sadler's Pennsylvania Cases, Pennsylvania County Court Reports, Pennsylvania District Court Reports, Pennsylvania Superior Court Reports, Philadelphia Reports, Pittsburgh Reports, Walker Supreme Court Cases, Wilcox, Woodward's Decisions.

Superior Court—Vol. 56.

Silvernail—Vol. 1.

Leading Cases Annotated—Vol. 1.

3. Reports of Selected Decisions of Federal and State Courts (General).

These are series of cases believed by the editors and compilers to be of general value and authority, dealing usually with questions which are of more than local value, or which are novel, or upon which there is a conflict of authority. The volumes in which they are published contain, by way of annotation, much material of secondary authority. (See below, Books of Secondary Authority F.)

a. The Trinity Series.

(1) American Decisions, 100 volumes (1760-1869).

(2) American Reports, 60 volumes (1870-1887).

(3) American State Reports, 140 volumes (1887-1917).

b. Lawyers' Reports Annotated.

(1) L.R.A., First Series, 70 volumes (1888-1905).

(2) L.R.A., New Series, 52 volumes (1906-1914).

(3) L.R.A., Third Unit, 24 volumes (1915-1918).

c. American and English Annotated Cases, 21 volumes (1906-1917). Cases from Canadian and British reports are included.

d. American Annotated Cases, 32 volumes (1912-1918). This series represents a consolidation, and is a continuation of Lawyers' Reports Annotated and American Annotated Cases. Publication began in 1919; about 6 volumes per year are issued.

e. American Law Reports Annotated. This series represents a consolidation, and is a continuation of Lawyers' Reports Annotated and American Annotated Cases. Publication began in 1919; about 6 volumes per year are issued.

4. Reports of Selected Decisions of Federal and State Courts upon Special Subjects.

South Carolina, Law: Bay, Brevard, Treadway (included in Brevard's Reports, Vol. 3), Mill (Constitutional), Nott and McCord, McCord, Harper, Bailey, Hill, Riley, Dudley, Rice, Cheves, McMullan, Spear, Strobhart, Richardson, South Carolina Reports, New Series; Chancery: Desaussure, Harper, McCord, Bailey, Richardson's Cases, Hill, Riley, Dudley, Rice, Cheves, McMullan, Spear, Richardson, Strobhart, Richardson.

Tennessee, Law: Overton, Cooke, Haywood, Peck, Martin and Yerger, Yerger, Meigs, Humphreys, Swan, Sneed, Head, Coldwell, Heiskell, Baxter, Lea, Pickle, Tennessee Reports, Tennessee Civil Appeals, Tennessee Circuit Court; Chancery: Tennessee Chancery Reports (Cooper), Tennessee Chancery Appeals Reports.

Texas: Dallam's Decisions, Texas Supreme Court Reports, Texas Appeal Reports, Texas Criminal Appeals Reports (31 to 97), Texas Civil Appeal Reports, Texas Unreported Cases (Posey), Vol. 25 Supp. Tex. Sup. Ct. Rep., Texas Civil Appeals Cases.

Vermont: Chipman (N.), Chipman (D.), Tyler, Brayton, Aiken, Vermont Reports.

Virginia: Jefferson, Wythe's Chancery Reports, Washington, Virginia Criminal Cases, Call, Hening and Munford, Munford, Gilmer, Randolph, Leigh, Robinson, Grat-tan, Virginia Reports. (In June, 1912, the Virginia Supreme Court of Appeals made a rule requiring counsel to cite the above listed reports by consecutive number of volume as well as by the Reporter's name.) Special Virginia Reports: Patton, Jr. and Heath, Court of Appeals, Howison, Criminal Trials, Virginia Decisions.—H. E. W.

- a. *American Bankruptcy Reports*. Contains bankruptcy cases in Federal and State Courts, 49 volumes (1899-1923).
- b. *American Bankruptcy Reports, New Series*, 1923 to date.
- c. *American Criminal Reports*, 15 volumes (1877-1909). Contains selected criminal cases from American, English, Scotch, Irish, and Canadian law reports.
- d. *Negligence and Compensation Cases*. Contains selected cases dealing with negligence, employer's liability, and workmen's compensation decided by American, English, and Canadian courts from 1912 to date. This series is a continuation of *American Negligence Reports*, 21 volumes (1896-1910), which in turn was a continuation of *American Negligence Cases*, 17 volumes (1789-1896).
- e. *Public Utility Reports Annotated*. Contains what the editors deem important decisions and orders of commissions and courts concerning regulation of public utilities from 1915 to date. Advance sheets are issued bi-weekly.
- f. For a list of other series of selected cases (which have been discontinued), see Hicks, *Materials and Methods of Legal Research* (1923), page 559.

D. Reports of Judicial Decisions in England.

1. Prior to the Year Books.

- a. *Bigelow, Placita Anglo-Normanica*. Containing miscellaneous cases from William I to Richard I (1066-1195), collected by Melville M. Bigelow from various historical documents and published in 1879.
- b. *Plea Rolls*. Our earliest known plea rolls date from 1194. The plea roll of a term contained a record of each case tried at the term, giving "the names of the parties to the (an) action, the nature of the action, the plaintiff's statement of his case, the defendant's defence, and the pleas upon which both parties finally rested their case, the issue left to a jury, if an issue were left to one, the verdict of that jury if one were ever delivered, and the judgment of the Court upon that verdict."¹⁰⁸ All these rolls in the *Curia Regis* thru 1201 have now been made accessible in the following:

- (1) *Palgrave, Rotuli Curiae Regis* (1194-1199), published in 1835.
- (2) *Maitland, Three Rolls in King's Court* (1194-1195), published in 1891.
- (3) *Curia Regis Rolls*, published by the British Government in 1923.

Cases from other rolls are available in:¹⁰⁹

- (1) *Baildon, Select Civil Pleas*, 1889 (1200-1203).
- (2) *Maitland, Select Pleas of the Crown*, 1888 (1200-1225).

¹⁰⁸ Bolland, *The Year Books* 27, 28 (1921).

¹⁰⁹ The date immediately following the title is the year of publication; the date in parenthesis indicates the period covered by the cases.

- (3) Healey, Somerset Pleas, 1897 (1200-1257).
- (4) Clay, Three Yorkshire Assize Rolles, 1911 (1202-1208).
- (5) Maitland, Gloucester Pleas of the Crown, 1884 (1221).
- (6) Watson, Bristol Pleas of the Crown, 1902 (1221).
- (7) Parker, Calendar of Lancashire Assize Rolls, 1904-1905 (1241-1285).
- (8) Page, Three Northumberland Assize Rolls, 1891 (1256-1279).
- (9) Bracton's Note Book, 1887 (1218-1240).
- (10) Phillimore, Pleas of the Court of King's Bench, 1898 (1297).

And excerpts from rolls from the reigns of Richard I to Edward III are found in a compilation made during the reign of Elizabeth and known as
Abbreviatio Placitorum (1189-1327).

Records of some early state trials with reports of testimony, etc., are published in

- (1) Cobbett and Howell, State Trials, 1809-1828 (1163-1820).
- (2) Tout and Johnstone, State Trials of Edward I, 1906 (1289-1293).

2. The Year Books.

"So far as we know the earliest Year Book now in existence is one of the eighteenth year of Edward I, 1289-1290. From that time onwards until 27 Henry VIII, 1535, we have a fairly perfect succession of them. There are a few terms of Edward I's reign missing; and in the reigns of Henry VII and VIII there are intermissions. They stop finally, as I have just said, in 1535, when their place was taken by printed reports made by counsel who published them in their own names."¹¹⁰

Between 1866 and 1879 the British Records Office produced in five volumes the Year Books for 20 to 35 Edward I (1292-1307) edited by Mr. A. J. Horwood in a most scholarly fashion, and between 1883 and 1911 the Year Books for 11 to 20 Edward III (1337-1346) in 15 volumes, the first volume edited by Mr. Horwood and Mr. Luke Owen Pike, the others by Mr. Pike, who even improved upon Horwood's work. The Year Book for 12 Richard II (1289-1290) was published in 1914 by Harvard University Press and under the Ames Foundation. The Selden Society, between 1903 and 1922, published fifteen volumes of Year Books of the early years of Edward II (1307-1314) ably edited by Maitland, Turner, Harcourt, Bolland, Vinogradoff, and Ehrlich. It is still engaged in its plan to publish at least the remaining years of that reign. The result is that there are at present in print the following series of Year Books:

The Black Letter Edition (1307-1537) (unsatisfactory).

Rolls Series, Horwood (1292-1307).

¹¹⁰ Bolland, *The Year Books*, 8.

Rolls Series, Horwood and Pike (1337-1346).
Selden Society (1307-1314).

3. From the Year Books to the Law Reports.

From the beginning of the sixteenth century there has been no lack of law reports in England, but not all reports have been of equal worth; indeed they vary in merit from excellent to worthless. . . . A full list of English reporters may be found in Hicks,¹¹¹ pp. 535-547, in Cooley, *Brief Making and the Use of Law Books*, 51-59, and in numerous other places, so that they will not be set down here. Suffice it to say that it seems to be generally agreed that of the earlier common law reports the following are of excellent authority: Dyer, Plowden, Coke, Parts 1-11, Croke, Yelverton, Hobart, and Saunders; the following very good: Moore, Willes, Foster, and Wilson; the following good: Anderson, Leonard, Davies, Rolle, O. Bridgeman, Sir T. Jones, Lord Raymond, Parker; the following from poor to worthless: Noy, Coke, Parts 12, 13, Godbolt, Gouldsbrough, Popham, Lane, Ley, Hutton, J. Bridgeman, Latch, Hetley, Aleyn, Siderfin, Keble. Modern excepting volumes 2, 6, and 12, Comerbach, Salkeld, volume 3, Gilbert, *Cases in Law and Equity*, Fitzgibbon, W. Kelynge, Sayre. From Burrow on, most of the reports, except Lot, the eighth volume of Taunton, and Anstruther, have been of good repute. Most of the early Chancery reports are poor; not till Peere Williams (1695-1736) is there a clear and accurate reporter. Cox's reports (1783-1796) are the next worthy of much commendation; thereafter the chancery reports are generally satisfactory, ranging from fair to excellent.

4. The Law Reports.

Since 1865 the Law Reports have been published by the Incorporated Council of Law Reporting, a private institution, not under government control. The reporters are employed and paid by this corporation but are appointed with the approval of the judges; and their reports are not published until after approval or revision by the judges. From 1866 to 1875 the reports were issued in three series as follows:

- a. Appellate, consisting of English and Irish Appeal cases before the House of Lords, Scotch and Divorce Appeals before the House of Lords, and Privy Council Appeal Cases.
- b. Chancery, consisting of Chancery Appeal Cases, including Bankruptcy and Lunacy, and Equity Cases before the Master of the Rolls and before the Vice-Chancellors.
- c. Common Law, consisting of Admiralty and Ecclesiastical Cases, Common Pleas Cases, Exchequer Cases, Queen's Bench Cases, and Probate and Divorce Cases. With each section were reported Cases on Appeal from the court in question; thus, in Queen's Bench Cases were included cases in the Exchequer Chamber on Appeal from the Court of Queen's Bench.

These three series with their subdivisions made ten sets of reports. By the acts of 1873 and 1875 the Supreme Court of Judicature

¹¹¹ Hicks, *Materials and Methods of Legal Research*.

was established, consisting of the Court of Appeal and the High Court of Justice with its five subdivisions, namely, Queen's Bench Division, Common Pleas Division, Exchequer Division, Chancery Division, and Probate, Divorce, and Admiralty Division. The ten sets were reduced in 1875 to six: (1) Appeal Cases, comprising all in the former Appellate Series; (2) Queen's Bench Division; (3) Common Pleas Division; (4) Exchequer Division; (5) Chancery Division, and (6) Probate Division. Each of these last five reported not only the cases of original jurisdiction in the particular division, but also the decisions of the Court of Appeal on Appeals from that division. Since 1880, when the Common Pleas Division and the Exchequer Division were merged in the Queen's Bench Division, but four sets of reports have been published, namely, Appeal Cases, Queen's or King's Bench Division, Chancery Division, and Probate Division.

Before 1865 the English reports are cited by the name of the reporter; from 1865 to 1890 they are cited as Law Reports followed by the number of the volume and the name of the court, usually abbreviated thus: L.R. 5 Q.B. or L.R. 5 Q.B.D. The Appeal Cases in the House of Lords and Privy Council, however, are cited merely by volume number followed by Appeal Cases, abbreviated App. Cas. From 1891 the reports are cited by giving the year of publication, the number of the volume of that year, and the abbreviation of the name of the court, thus: L. R. 1923, 2 K.B. and 1923 App. Cas.

5. English Reprints.

- a. English Reports, Full Reprint. This reprints verbatim all the English reports, except the Year Books, prior to 1865.
- b. The Revised Reports. This reprints all cases of common law and equity deemed to be of present value from 1785 to 1865.
- c. English Common Law Reports. An American reprint of cases in King's Bench and Queen's Bench from 1813 to 1872.
- d. English Chancery Reports. An American reprint of cases decided 1843 to 1874.
- e. Moak's English Cases. Contains in 38 volumes English Cases decided between 1872 and 1889, with notes.
- f. There are several other American reprints of portions of English reports, but they are not of importance.

6. Collateral Reports.

- a. During the period before 1865, reports which had the supervision of the court were called authorized; all others were referred to as collateral. No attempt is made here to mention them. They will be found listed in Hicks, 535-547.
- b. Law Times Reports. The Law Times since 1843 has currently reported cases from all courts.
- c. The Times Law Reports. These reports since 1885 have published current cases from all courts.
- d. Weekly Notes. This is a publication of the Incorporated Council of Law Reporting, which since 1866 has given advance reports of cases later published in the Law Reports.

7. Reports of Selected Decisions of English Courts.

- a. Bankruptcy and Company Winding Up Cases, begun in 1915 and succeeding Manson's Bankruptcy and Companies Cases which began in 1894 and ended in 1914.
- b. Cox's Criminal Law Cases, begun in 1843.
- c. Cohen's Criminal Appeal Reports, begun in 1908.
- d. Butterworth's Workmen's Compensation Cases, begun in 1915 and succeeding Minton-Senhouse's Workmen's Compensation Cases.
- e. Reports of Cases under the Workmen's Compensation Act, and on Insurance Law.
- f. There are other collections of reports of special cases, a few still current, but most of them have ceased publication.
- g. Smith's Leading Cases. Selected from all topics in the law and annotated. The ninth American edition was published in 1889.
- h. English Ruling Cases. In 26 volumes are collected English cases prior to 1900 deemed by the editors to be leading cases. They are arranged topically and annotated with English and American notes.
- i. British Ruling Cases. This is a current series of annotated cases from 1900 to date, containing cases which its editors believe to be of general interest and importance from England, Ireland, Scotland, Canada, Australia, and New Zealand.

E. Reports of Judicial Decisions of Other Parts of British Empire.

1. A list of reports of the Courts of Ireland, Scotland, and Canada and Canadian Provinces will be found in Hicks, 547-555.
2. Reports of Australian Courts.
 - a. Commonwealth Law Reports reporting decisions of the High Court of Australia.
 - b. Each of the following states has reports bearing the name of the state, in much the same manner as the states of the United States, namely, New South Wales, Victoria, Queensland, South Australia, West Australia, Tasmania.
3. Reports of New Zealand Courts.
 - a. These decisions are reported in New Zealand Law Reports.

Books of Secondary Authority

A. Digests. A digest of a volume of reports or of a set of reports is an elaborate index to that volume or set.

1. American Digests, General.

Until about the middle of the nineteenth century there were no respectable digests of American case law as a whole. Dane's Abridgment, published in 1823-1824, was a hybrid of digest and commentary confined for the most part to the law of the Federal Courts and of Massachusetts. In 1848 the United States Digest began publication and continued till 1871, digesting decisions from 1847 to 1869. In 1874-

1876 Abbott's United States Digest of Cases from 1790 to 1869 in 14 volumes was published. This was followed by United States Digest, New Series, brought out annually, till merged in the American Digest in 1887. The Complete Digest which began in 1887 was combined with the American in 1890; and the General Digest which commenced in 1890 continued publication till 1907. Since that date the American Digest System has been without competition. It now consists of:

- a. Century Digest, classifying and abstracting decisions of appellate courts from 1658 to 1896.
 - b. First Decennial, 1896-1906.
 - c. Second Decennial, 1907-1916.
 - d. American Digest, Key Number Series, 1917 to date.
 - e. American Monthly Digest. . . .
2. American Digests, Special.
 - a. In almost every state there exists a digest of the reports of that state, sometimes called by the name of the state, as the California Digest; sometimes called by the name of the compiler, as Dunnell's Digest (Minnesota). Some of these are made after the plan of the American Digest System; others are encyclopaedic in form.
 - b. Digests of the various parts of the National Reporter System.
 - c. Digests of the various sets of selected cases.
3. English Digests.
 - a. Early Abridgments.
 - (1) Statham's Abridgment, believed to have been first printed about 1490. It contains abstracts of cases down to the end of Henry VI's reign (1422-1461). Many of them are not to be found in any published Year Book. A modern edition in 2 volumes with English translation was published in 1915 by Margaret C. Klingelsmith.
 - (2) Fitzherbert's Abridgment, published in 1514, abstracting cases to the 21st year of Henry VII (1496-1497).
 - (3) Brooke's Abridgment, published in 1568. It is based largely on Fitzherbert, but abstracts cases down to the year of Brooke's death, 1558.
 - (4) Hughes' Abridgment, published 1660-1662, is a supplement to Brooke, abstracting cases from 1558 to 1660.
 - (5) Rolle's Abridgment, published in 1668, edited by Sir Matthew Hale. . . .
 - (6) Viner's Abridgment, published 1742-1756, in 23 volumes. The most ambitious of the abridgments, very carefully edited.
 - (7) Coventry and Hughes' Analytical Digested Index to the Common Law Reports, published in 1827 and digesting cases from 1216 to 1760.
 - b. Modern Digests. After Coventry and Hughes, there were several digests of Common Law Cases, and Edward Chitty's

Index to Cases in Equity and Bankruptcy, but the only modern digests of importance are:

- (1) Mews, Digest of English Case Law. Publication was begun in 1898. It digests cases in law and equity, but omits cases which its editors deem of no present value. The original work is in 16 volumes. Annual supplements keep it up to date.
- (2) Butterworths' Ten Year Digest (1898-1907) and Butterworths' Yearly Digest from 1908 to date.
- (3) English and Empire Digest. Begun in 1919 and in progress of publication. In 1923 13 volumes covering A to County Courts had been published. It purports to be "a complete digest of every English case reported from early time to the present day, with additional cases from the courts of Scotland, Ireland, the Empire of India, and the Dominions beyond the sea".
- (4) Law Reports Digests, published by the incorporated Council of Law Reporting, digesting from 1865 to 1912 only those cases reported in the Law Reports and Weekly Notes, and thereafter including other English cases and selected cases from Scotland and Ireland:
 - (a) Consolidated Digest (1865-1890).
 - (b) Decennial Digest (1891-1900).
 - (c) Ten Years' Digest (1901-1910).
 - (d) Ten Years' Digest (1911-1920).
 - (e) Annual Digests with quarterly cumulative supplements to date.

Generally speaking, the English digests are not as well done as the American in substance or in form. They do not so thoroughly analyze the cases digested or present so detailed a classification, nor do they furnish such effective mechanical aids to one attempting to make an exhaustive search of the decisions.

B. Encyclopedias.

An encyclopedia of law, or of a particular department of the law, is an alphabetically arranged collection of treatises, each constructed according to a uniform plan and each treating a single topic the limits of which are so prescribed that the treatises will not overlap and that taken together they will cover the entire field of law or of that particular department of law. . . . The encyclopedia is often very helpful in furnishing a general survey of a topic or a portion of a topic, but its chief function is that of the digest. It is a valuable tool in the search for applicable judicial precedents; but no statement in it should be accepted at its face value until verified by the decisions cited to sustain it.

1. American Encyclopedias.

- a. American and English Encyclopedia of Law (1st ed., 1887-1896), published in 29 volumes and index, covering substantive law and evidence.

- b. *American and English Encyclopedia of Law* (2d ed., 1896-1905), published in 30 volumes and index, with a five-volume supplement (1905-1908), covering substantive law and evidence.
 - c. *Encyclopedia of Pleading and Practice* (1895-1902), published in 22 volumes and index, with a four-volume supplement (1903-1909), treating procedural law in such a manner that, in combination with the second edition of *American and English Encyclopedia of Law*, the whole field of law was covered.
 - d. *Encyclopedia of Forms and Precedents* (1896-1904), published in 18 volumes.
 - e. *American and English Encyclopedia of Law and Practice*. Publication was begun in 1900 but only 5 volumes covering A to Assignment were produced.
 - f. *Cyclopedia of Law and Procedure*. Cyc (1901-1912), published in 40 volumes. Cumulative Annual Supplements have been issued since 1901.
 - g. *Corpus Juris*. This is really a new edition of Cyc but on the whole much better done. Publication was begun in 1914; 33 volumes have been produced, and it is announced that it will be completed in 70 volumes. Supplementary volumes are issued periodically to keep the citations up to date and to permit necessary additions to the text.
 - h. *Standard Encyclopedia of Procedure* (1911-1922), published in 26 volumes. Periodical supplements are issued.
 - i. *Encyclopedia of Evidence* (1902-1909), published in 14 volumes. One-volume supplement in 1919.
 - j. *Ruling Case Law* (1914-1921), published in 28 volumes, with a four-volume supplement (1921-1923). Its publishers assert it to be "at once a digest of particular reports and a compendium of the entire body of the law as developed by United States Supreme Court Reports, Lawyers' Edition, American Law Reports Annotated, Lawyers' Reports Annotated, American Decisions, American Reports, American State Reports, American and English Annotated Cases, American Annotated Cases, English Ruling Cases, and British Ruling Cases". As a cyclopedic digest of the reports named, it is valuable and useful in that it makes largely unnecessary the handling of the digests of the separate sets. As "a compendium of the entire body of the law, etc.," it is of comparatively small value and is to be used with caution.
2. *English Encyclopedias*.
- a. *Encyclopedia of the Laws of England* (1st ed., 1897-1898), published in 12 volumes, with a one-volume supplement in 1903. It is a mere cyclopedic digest.

- b. Same (2d ed., 1906-1909), published in 15 volumes, with a one-volume supplement in 1913 and a one-volume supplement in 1918.
- c. Halsbury's Laws of England (1907-1917), published in 31 volumes, with periodically revised supplement. The form of this work is similar to that of the American encyclopedias.
- d. Encyclopedia of Forms and Precedents (1902-1909), published in 17 volumes.

C. Textbooks or Treatises.

Textbooks and treatises exist in every degree of merit and of usefulness. Some are still, and others in the past have been, considered to be practically authoritative expositions of the law as it was when they were written. For example, Glanville is commonly accepted as conclusive, for the original sources from which he formulated his statements are largely unavailable. The same is true of much of Bracton. Britton and Fleta, drawn largely from Bracton, are not so unreservedly accepted. Littleton's Tenures is still highly esteemed, and the writings of Lord Coke, while no longer regarded as the pronouncements of an ultimate authority, are generally greatly respected. Indeed, most of these treatises are usually accorded almost equal respect with judicial precedents.

Next in order comes a class of books which have had great influence on the development of the law, like Blackstone's Commentaries, Kent's Commentaries, the works of Story, and Cooley's Constitutional Limitations. Contemporary books in the same category are Gray on the Rule against Perpetuities, Wigmore on Evidence, and Williston on Contracts. In such treatises the writers attempt not only to make a clear and intelligible statement of the existing state of judicial opinion, but also to examine critically the grounds upon which it rests and to formulate their own reasoned conclusions as to what it ought to be. These books represent the results of a lifetime of scholarly research and real thought, and have more inherent worth than the decisions of the vast majority of our too busy courts. Though, under the doctrine of *stare decisis*, they have not the authority of judicial precedent, their influence in shaping the law may safely be said to exceed that of the reported decisions of very many of our appellate tribunals.

But unfortunately it must be said that the vast majority of textbooks are not in this class. The better of them do serve a useful purpose similar to that of an article in a standard encyclopedia, but many of them are a pure waste of good paper. At best they merely give the reader a starting point in his search for authorities with a very general survey of the topic in question; and often they mislead him as to the state of the law and delay him in finding the applicable precedents. The student should get familiar with the names of the better texts and treatises, so as to avoid wasting time and labor on the others.

D. Law Dictionaries.

There is a long line of English Law Dictionaries beginning in 1538 with Rastell's *Expositiones Terminorum Legum Anglorum* and ending for the present with Byrne's *Dictionary of English Law* in 1923. American dictionaries commence with Bouvier's *Law Dictionary* in 1839, and the latest first edition is Pope's *Legal Definitions, Words Defined by the Courts*, 1920. It is important to observe that many of these works do not purport to give the usually accepted meanings of words or of phrases, but merely collect definitions which the courts or legislatures have made, and such definitions must be read in the light of the context. They can never be relied upon as determining the general legal meaning of a word or term. Important modern dictionaries are:

1. American.
 - a. Bouvier, *Law Dictionary and Concise Encyclopedia* (Rawle's Third Edition), 1914.
 - b. Ballentine, *Law Dictionary*, 1923 ed.
 - c. *Judicial and Statutory Definitions of Words and Phrases*, commonly known as *Words and Phrases* (1st series in 8 volumes, 1905; 2d series in 4 volumes, 1914).
2. English.
 - a. Byrne, *Dictionary of English Law*.
 - b. Mozley and Whitely, *Law Dictionary* (1923 ed.).
 - c. Stroud, *Judicial Dictionary of Words and Phrases Judicially Interpreted* (ed. 1903-1909 in 4 volumes).
3. Australia.

Bedwell, *Australasian Judicial Dictionary*, 1920.
4. Canada.

Widdefield, *Words and Phrases Judicially defined*, 1914.
5. South Africa.

Bell, *South African Legal Dictionary*, 1910.

E. Legal Periodicals.

"For ten and twenty years past", says Professor John H. Wigmore, "there have been at the service of the profession more than a dozen legal periodicals, publishing the weightiest critiques of current legal problems."¹¹² And besides this number there have been many more, some of them of doubtful value, and others practically worthless as contributions to legal learning or scholarship. In the use of law magazines the same painstaking discrimination is necessary as in the use of treatises and of articles in legal encyclopedias. The standing of the publication, the learning and ability of the writer, the authenticity of his data, the inherent reasonableness of his deductions in the light of legal history, existing social conditions and the known truths of all sciences affecting human conduct,—all these must be carefully weighed in attempting to place the proper value upon legal periodical literature.

A brief history of legal periodicals and a list of them, British and American, will be found in Hicks, *Materials and Methods of Legal*

¹¹² Wigmore, *Evidence* (2d ed., 1923), 115.

Research, pp. 162-168, 572-609. Among the more important of them now current are:

1. American (General).
 - a. Harvard Law Review.
 - b. Yale Law Journal.
 - c. Columbia Law Review.
 - d. Michigan Law Review.
 - e. Minnesota Law Review.
 - f. Illinois Law Review.
 - g. University of Pennsylvania Law Review.
 - h. American Bar Association Journal.¹¹³
2. American (Special).
 - a. Journal of American Institute of Criminal Law and Criminology.
 - b. American Journal of International Law.
 - c. Medico-Legal Journal.
3. English.
 - a. Law Quarterly Review.
 - b. Juridical Review.
 - c. Solicitors' Journal.
 - d. Canadian Bar Review.

F. Annotations to Statutes and Selected Cases.

In books containing reprints of constitutions, statutes, and selected judicial decisions, as pointed out above, there are frequently included as annotations much material by way of digests of previous cases and commentaries thereon.

Key Books

A. Indexes.

1. Descriptive Word Index to Decennial Digest.

"A compilation of titles under which are references directing the reader to the various topics and sections in the Decennial Digest. These titles are words descriptive of essential facts which have constituted the several elements of the right of action or defense in decided cases. Many of these titles are words that describe, or the names of persons, places, and physical things which have been the subject of dispute. Some of them are words that describe a question of law or fact not directly involving any particular person or thing, but going to particular questions of law and procedure which have been the subjects of dispute, and some of these titles are words that describe a constitutional provision, a legislative act, or a legal doctrine which has been the subject of dispute."—Preface, p. ix.

2. Index and Concordance of Cyc. An index of subjects and topics contained in Cyc arranged alphabetically.
3. Index to notes in Lawyers' Reports Annotated.
 - a. Original volume covers 1 to 70 L.R.A. and 1 to 42 L.R.A. New Series.

¹¹³ Perhaps in addition should be mentioned: California Law Review, Iowa Law Review, and Virginia Law Review.—H.E.W.

- b. Supplement covers 43 L.R.A. New Series to 1916 F, L.R.A., and 3-5 British Ruling Cases.
- c. Triennial Index Digest covers 1915-1917 notes and cases.
- 4. Index to Notes in Annotated Cases, from 1 Ann. Cas. to 1916 B.
- 5. Index to Notes in American Law Reports, Annotated.
- 6. Common Sense Index to Negligence and Compensation Cases, Annotated.
- 7. List of Important Notes in American Decisions, American Reports, and American State Reports.
- 8. Jones, Index to Legal Periodicals in 4 volumes, thru 1922.
- 9. American Association of Law Libraries, Index to Legal Periodicals, 1908 to date. This index is issued quarterly and cumulated annually.
- 10. There are also various indexes to statutes, and practically every set of selected cases is furnished with an index or an index-digest. See also below Shepard's Citations. The above list is not intended to be complete.

B. Notes on Reported Cases.

- 1. Rose's Notes to United States Reports.

Issued in 1901 in 12 volumes; revised 1917-1920 in 20 volumes. These are annotations to the decisions of the United States Supreme Court, showing where each decision has been cited by state and federal courts, the point for which cited, and the disposition of that point by the court so citing.

- 2. Notes to various state reports.

- a. Notes on Minnesota Reports. These were published in 1911 and cover volumes 1 to 100 Minnesota Reports. They "trace out every citation of each Minnesota case by any court of last resort in this country, showing how it has been applied, developed, strengthened, limited, or in any way affected by later decisions that have cited it as a precedent".—Preface.

- b. Publications similar to the Notes on Minnesota Decisions are found in several other states, for example, by Joseph W. Thompson in Indiana covering from 1 Blackford to 182 Indiana Reports, and 1 to 57 Indiana Appellate Reports, and by Fred P. Caldwell in Kentucky covering 1 to 177 Kentucky Reports.

- 3. L.R.A. Cases as Authorities.

Published in 1913 in 6 volumes, show where every case in volumes 1-70 L.R.A. has been cited or referred to in any case reported in the United States; also where every L.R.A. case has been cited in any later annotations of Lawyers' Reports Annotated, American State Reports, English Ruling Cases, British Ruling Cases, and United States Supreme Court Reports. They also note the affirmance or reversal of every such case by the United States Supreme Court.

4. Notes to American Decisions.

These treat the cases in American Decisions and American State Reports in somewhat the same way as L.R.A. Cases as Authorities treats the cases in L.R.A.

5. The English and Empire Digest.

Gives with the digest of each case a reference to all subsequent decisions in which such case is cited.

C. Tables of Cases Reported, Cited, Overruled, Etc.

1. Tables of Cases Reported and Cited.

- a. Almost every volume and set of reports has a table of cases reported and some have tables of cases cited therein.
- b. The American Digest System and most other digests have each a table of cases digested.
- c. Most textbooks have tables of cases cited.

2. Tables of Cases Affirmed, Modified, or Overruled.

- a. In the tables of cases in the American Digest System thru the second Decennial, the notation after the particular case indicates the final disposition of that case by the court of last resort. In each yearly volume from 1917 on, there is a separate table of cases affirmed, modified, or reversed by decisions digested in that volume.
- b. The sixth volume of the Digest of United States Supreme Court Reports, digesting volumes 1-206, has a table showing "all reported cases in state courts or lower federal courts which have been affirmed or reversed by the Supreme Court of the United States".
- c. In several of the states such tables of cases have been published from time to time; and several state digests contain them. In some volumes of reports, there are tables of cases modified or reversed, by the decisions therein.

D. Citators.

1. Federal Citations.

By Ash in 4 volumes, covering the period from 1789 to 1901. They show where each case decided by the United States District Court, Circuit Court, Circuit Court of Appeals, and Court of Claims has been subsequently cited in the United States Supreme Court Reports, Federal Reporter, Federal Cases, or state reports, and where cases in the state reports have been cited in the federal reports.

2. Shepard's Citation.

This series in conjunction with the Citator, which it is gradually absorbing, covers the reports of all the courts of the United States, the Reporter System, and the reports of every state except Delaware, Kentucky, Mississippi, Nevada, and South Carolina. For each of these states and for the District of Columbia a Shepard's citation book is in preparation. Each unit is kept up to date by periodical supplements. The scope of the various units is not uniform. For example, the citation book for Connecticut includes citations of all Connecticut cases in

the Connecticut Reports, the Federal Reporter, United States Supreme Court Reports, and the Atlantic Reporter and in notes in the various series of selected cases, and citations to the Constitutions of the United States and of Connecticut and to the statutes of Connecticut; the citation book for Massachusetts has no citations to the Northeastern Reporter but otherwise is as extensive in scope as the Connecticut book. The citation book for the United States Supreme Court furnishes citations to the United States Constitution, the Revised Statutes of the United States, the Statutes at Large, and the rules of court; to the official edition of the United States Supreme Court Reports, the Lawyers' edition thereof, and the Supreme Court Reporter; and to decisions of the Court of Claims, and of the various executive departments including the Opinions of the Attorney-General. It has also a classification of the American Digest System, Key Number Series.

3. Citer Digest.

The revised edition of this work was published in 1916 and is kept up to date by cumulative supplements issued in January, May, and September. It "shows the history and construction of each act of Congress down to date", giving reference to the Revised Statutes, Statutes at Large, Compiled Statutes, and Federal Statutes Annotated, and citing all cases where they have been dealt with by the courts.

CHAPTER XVIII

THE USE OF LAW BOOKS

THE problem of how to use law books is a threefold problem. It includes: first, the problem of how to find a legislative enactment or a judicial precedent, if any, upon a given point; second, the problem of how to read and abstract reported cases; and third, the problem of brief making, or how to arrange the legislative enactments and judicial precedents (as well as social statistics if used), in the form of a logical argument.

Finding Authorities:¹¹⁴ **Statutes.** If a student, or lawyer, has a point of law on which he desires to find the state of the authorities he should first analyze his facts accurately for the point of view, make an "index list" of apposite words and phrases, and provide himself with a memorandum book for opinions and case cards for cases. Then he should look for legislative enactments, for if valid and applicable they will usually decide the point. In the United States, this means the Constitutions of the United States and of the state, acts of Congress and treaties, as well as acts of the state legislature and subordinate bodies. In England, it is not necessary to look for constitutional provisions. If any statutory provisions are found, the way in which they have been interpreted by the courts, if at all, must also be found.

United States Constitution. Every lawyer and law student should be familiar enough with the United States Constitution to know without examination whether or not his legal problem involves a constitutional question of the federal Constitution, but if he is in doubt he either can consult an index to the Constitution or can search the document itself. Any judicial interpretations of the Constitution can be found by using the Citer-Digest, Shepard's United States Citations, volumes 10 and 11 of the United States Compiled Statutes and Supplements, and volumes 10 and 11 of the Federal Statutes Annotated and Supplements; and by searching for judicial precedents in the manner outlined below.

¹¹⁴ Morgan, *Introduction to Study of Law*; Cooley, *Brief Making*; Lawyers' Co-operative Publishing Company, *Law Books and their Use*; Kiser, *Principles and Practice of Legal Research*; Hicks, *Materials and Methods of Legal Research*.

State Constitution. What has been said above about finding constitutional provisions in the federal Constitution will apply to finding provisions in the state constitution. For judicial interpretations thereof he must examine the annotations to a local edition of the state constitution, Shepard's Citation Book for the state, and judicial precedents in general.

Treaties. If one ever has a problem involving a treaty provision he can find it in the collections of Malloy and Garfield, the Numbered Series, and the United States Statutes at Large, and he can find judicial interpretations thereof in the judicial precedents. No distinctive helps are available in this field.

Acts of Congress. The acts of Congress are found in the United States Statutes at Large which have a numbered volume published at the close of each session of Congress, in the official Revised Statutes of the United States of 1875 and 1878, and in the unofficial Federal Statutes Annotated of 1906 and 1916, the United States Compiled Statutes of 1916 and Barnes Federal Code of 1919, and their supplements. This body of authority is so voluminous that if the searcher would find a provision on any specific point he should consult the indexes and largely rely upon the descriptive word method of search explained in connection with finding judicial precedents. Where a statute is cited by its popular name, as Sherman Act, or Carmack Amendment, it may be identified by means of the "Table of Laws Designated by Popular Names" in either the Federal Statutes Annotated or the United States Compiled Statutes. Judicial interpretations of federal statutes can be found in the annotations to the unofficial revisions and compilations, Shepard's Citation Book, and judicial precedents in general.

State Legislation. What has been said above with reference to finding congressional legislation will apply to finding state legislation. An examination of the index of the latest available compilation or revision of statutes must be supplemented by an examination of the indexes to the later session laws. The legislative and judicial history of state statutes can be found in annotated editions of the statutes, Shepard's Citation Book, and judicial precedents and lesser authorities.

Other Legislation. Ordinances and resolutions of municipal legislative bodies cover only a narrow field, but where search

for them is necessary the process is similar to that described above. For interpretations thereof judicial precedents and lesser authorities must be searched.

English Statutes. The British Constitution consists of acts of Parliament regulating the machinery of government, rules of the common law relative thereto, and usages sanctioned by custom. English statutes can be found in the Statutes at Large from Magna Charta, 9 Henry III, to 41 George III; Statutes at Large, United Kingdom, from 41 George III to 32 Victoria; and the Law Report Statutes from 32 Victoria on. They can also be found in such compilations as Chitty's Statutes. A table of statutes construed can be found in the front part of each volume of Halsbury's Laws of England. Many of the early English statutes have become a part of our common law, and many recent United States statutes (e.g. uniform laws) are based upon recent English statutes.

Judicial Precedents. After statutes, the next most important authorities for the student or lawyer to consult on any given point are the judicial precedents, and this is true whether or not he finds a constitutional or statutory provision in point, for if he finds such a provision he must search for its meaning in the judicial precedents, and if he finds no such provision he must search the judicial precedents for his primary authority. After the judicial precedents the next most important authorities are the books of secondary authority. It would seem, therefore, that the order in which the student or lawyer should proceed would be, first, to examine the books containing statutes; second, to examine the books containing the judicial precedents; and third, to examine the books of secondary authority; but this is not so. Books of secondary authority are key books opening the doors to the judicial precedents as well as books of secondary authority. For this reason the practical order for the student or lawyer, after an examination of the statutes, should probably be: (1) textbooks, (2) encyclopedias, (3) digests, (4) selected cases, (5) citation books, (6) periodicals, and (7) tables of cases.

Textbooks. In determining his legal problem by his analysis of his facts, the student or lawyer will have determined the general subject, as "contracts" or "property" as well as the specific subject, as "sales" or "wills", for which he will need

to use a textbook. He should select the latest editions of several of the best textbooks, if any, upon his appropriate subject. To find the particular point for which he needs to use such textbooks he should examine the tables of contents to find the subdivision where his particular topic is discussed; and if he cannot find what he wants in this way he should examine the indexes to find the selected word or phrase where his apposite word or phrase is treated. Sometimes in this work the searcher will find new words or phrases suggested to him which will help him in his further search.

Encyclopedias. In discussing the use of encyclopedias only the use of *Corpus Juris-Cyc* will be explained; because if the student learns the method of using this set he can adapt the method to the use of any encyclopedia by substituting for the "law chart" the publisher's scheme of classification. The publishers of the above encyclopedia have issued a law chart which shows their scheme of classification. According to this chart the field of the law is divided into seven grand divisions: Persons, Property, Contracts, Torts, Crimes, Remedies, and Government; each grand division has a number of subheads; and each subhead a number of topics. The topics are the titles of articles treated in *Corpus-Juris* and the *Cyclopedia of Law and Procedure*. At the head of each of such articles is a detailed analysis of its contents and a table of cross-references to other articles treating related subjects. The *Cyclopedia of Law and Procedure* has an index called "Index and Concordance of *Cyc*". If a reference to that work is found it can be translated into the proper reference to *Corpus-Juris* by the parallel reference tables in each volume of *Corpus-Juris*. The searcher should be able to decide from his preliminary analysis of his facts within which grand division of the law as above divided up his problem falls. If it falls within two or more, as for example persons and contracts, other things being equal it will be treated under the first one in the order given. He must then examine the subheads in the grand division selected, and after that the topics under the subhead, to ascertain where his question is most likely to be treated. With these topics found he should consult the analysis and table of cross-references at the head of each. Finally, as an additional safeguard, he should scan the Index and Concordance of *Cyc* for the apposite words and phrases in his list,

and find later cases by examining the Annotations to Cyc or Corpus Juris-Cyc. Any cases which the searcher thus finds and expects to use should both be noted on his case card and examined in the original reports.

American Digest System. The classification scheme of the American Digest System is practically identical with that of Corpus Juris. It has seven categories which correspond exactly to the seven grand divisions of Corpus Juris-Cyc. The seven categories are divided into thirty-four divisions. These divisions are subdivided into 413 titles, which is less than Corpus Juris has. Each title represents a separate topic in the digest, under which digest paragraphs are arranged in divisions, subdivisions, sections, and subsections, each introduced by a descriptive line. Preceding these paragraphs are a scope note, an analysis, and a list of cross-references. This system also has a Descriptive Word Index, made up of words and phrases alphabetically arranged, which constitute or denote or describe each of the 413 topic titles and each descriptive line of divisions, subdivisions, sections, and subsections of the digest; legal mandates, concepts, and doctrines, persons, places, and things; wrongs and injuries; different grounds of defense; various kinds of relief; every step and the manner of taking it in the conduct of a lawsuit; and every step in procuring the enforcement of an order or judgment. References are to the First Decennial Digest, but the paragraph numbers in the First Decennial Digest (key numbers) are identical with all subsequent parts of the system, that is, to all parts of the American Digest except the Century Edition. The searcher for judicial precedents thru the American Digest System, therefore, has two methods which he may pursue. With his problem determined, he can proceed to find his materials by using the classification scheme, ever working from the larger to the smaller head until he finds his particular point treated; or, with his apposite words and phrases selected, he can look for them or synonyms of them in the Descriptive Word Index. In selecting his apposite words, the searcher should have analyzed his case as to parties, place, or thing; wrongful act or injury, relief asked, and steps in the action, so as to give him descriptive words for each point. The searcher should examine the Century Digest, the two Decennials, and the Cumulative Table of Key-number Sec-

tions, and also the monthly advance sheets. Any cases found in the digest paragraphs should be examined in the original, since the digest paragraphs are only the headnotes of the cases. Theoretically a searcher should find any judicial precedents in point, whichever one of the American Digest methods he pursues, but practically it is sometimes very difficult, if not impossible, to follow the trail of the digester, as for example, when he digests the second child labor decision under internal revenue. Hence the searcher should not give up if he does not find the materials which he needs by following the two methods outlined above, but should also employ the other methods of search outlined in this chapter.

State Digests. If the searcher's problem involves the law of a particular state, he should examine the digest of that state, if any; and it may be advisable to examine the available digests of all the states if pertinent material cannot be found in the American Digest System. State digests are generally built on the plan of either the American Digest System or on the plan of Corpus Juris-Cyc, and the schemes of search applicable to them can be applied to state digests.

English Digests. In using the English digests the searcher should not use the descriptive word method but the scheme of classification method, and should familiarize himself with the particular scheme of classification employed by each digest, and with the equivalent English words used for certain United States words, as "company" for "corporation", "local government" for "municipal corporations", and "land clauses act" for "eminent domain."

Selected Cases. In searching for materials in the various selections of cases known as American Decisions, American Reports, American State Reports, American and English Annotated Cases, American Annotated Cases, English Ruling Cases, Lawyers' Reports Annotated, United States Supreme Court Reports (Lawyers' Edition), British Ruling Cases, and American Law Reports Annotated, the searcher should use the separate digest or index digest of each series which is built on the descriptive word plan, or Ruling Case Law which is a digest built on the encyclopedic plan for all cases and annotations in all of the series up to January 1, 1923.

Citation Books. For the subsequent history of the cases which the searcher has found in textbooks, encyclopedias,

digests, and series of selected cases and of which he should at some time make an abstract on his case cards, the searcher should consult the books of notes on reported cases, the tables of cases reported, cited, overruled, etc., and the citators; and for the history and construction of acts of Congress, the Citer Digest.

Periodicals. To find periodical material the searcher must search the indexes of separate periodicals, Jones' Index, and the Index of the Association of Law Libraries for characteristic titles and descriptive words and phrases as in the other books heretofore discussed.

Table of Cases. Whenever it is necessary for the searcher to look up any or all of his cases on his case cards, either for the purpose of abstracting them or to eliminate those of no worth, he will find it profitable to use the appropriate table of cases available. The First Decennial Table of Cases, commencing with volume 21 and running thru five volumes, is the most complete table of American cases and covers the cases decided from 1658 to 1906.

Analysis of Unit Operations and Analysis of Distinctive Jobs in Legal Bibliography. Immediately following is printed the material upon these two topics prepared by Dean John H. Wigmore. It is believed that this material covers all the operations used in the finding of authorities, and that the student who will solve the problems therein given, with the aid of the hints heretofore supplied and with such other incidental information as he will acquire in working on them, will acquire a mastery of the art of using law books so far as it relates to finding authorities.

LEGAL BIBLIOGRAPHY¹¹⁵

ANALYSIS OF UNIT OPERATIONS

By JOHN H. WIGMORE¹¹⁶

I. General Purpose:

To qualify a young lawyer with adequate skill to make practical use of all the printed sources of law ordinarily resorted to in professional practice.

¹¹⁵ Dean Wigmore has kindly consented to the incorporation in this study of both his Analysis of Unit Operations and his Analysis of Distinctive Jobs in Legal Bibliography. They are published here for the first time.

¹¹⁶ Dean and professor of law, Northwestern University Law School.

II. *Method:*

This general purpose is attained by analyzing all the various main operations or ways in which a lawyer is called upon to use these sources; by furnishing the student with the needful information about them, and, finally, by testing his ability to use each one of the operations separately, and to use them as a whole in the performance of standard jobs requiring skill in the use of law sources.

III. *General Works of Reference to be Used for Information:*

1. Brief-Making and the Use of Law Books, Cooley.
2. The Reporters, Wallace.
3. Handbook of English Law Reports, Fox.
4. Select Essays in Anglo-American History, Vol: 2. Essays by Holdsworth, Veeder.
5. Publishers' catalogues, Callaghan, Flood, Jones.
6. Chicago Law Institute Catalogue.
7. Miscellaneous books on legal bibliography.

IV. *Classification of Materials:*

- A. Judicial decisions: private reports for single jurisdictions.
- B. Judicial decisions: official reports.
- C. Judicial decisions: nation-wide reporting systems.
- D. Judicial decisions: digests and other finding apparatus.
- E. State legislation.
- F. Federal legislation.
- G. Treatises.
- H. Encyclopedias.
- I. Government bureaus and commissions.
- J. Periodicals.
- K. Location of books in library.

V. *Analysis of Unit Operations in the Use of Law-Sources:*

<i>Kind of Material Used</i>	<i>Operation Involved</i>	<i>Example Test for Operation</i>
A. Judicial decisions: private reports for single jurisdictions:		
1. Abbreviations of names.	Translate the abbreviations of the reporter's name.	What name is meant by M. & W.? Burr.? Rich.?
2. Reporter's jurisdiction.	Identify the jurisdiction of the reporter.	What court was reported by Breese, Johnson, Metcalf, Wilson, Campbell, Dallas?
3. Reporter's period.	Locate, approximately (by century), the period of the report.	In what century or half-century were the reports of Espinasse, Day, Bay, Wallace?
4. Reporter's court.	Locate the court in which the reporter reported.	What court was reported by Blackstone, Johnson, Cranch, Howard?

<i>Kind of Material Used</i>	<i>Operation Involved</i>	<i>Example Test for Operation</i>
B. Judicial decisions:		
official reports for single jurisdictions:		
1. Scope of official reports.	Determine what portion of a state's judicial reports is covered by the official series.	Does the official series cover all reports since the beginning, in Illinois, New York, Massachusetts, Connecticut? If not, how much?
2. Relation of official series to prior private reports.	Determine whether the official serial numbering goes back to the beginning, or to what period.	In the following states, does the current serial numbering begin after the private reporters, or does it include the private reporters in its total? If the former, about what period did the official numbering begin? If the latter, what is the first official number that is used in the series—Massachusetts, New York, South Carolina.
3. Multiple series for a single state.	Discriminate the several series, in a single state, as to the different courts.	In the following states, are there separate official series for different higher courts—Illinois, Wisconsin, Oklahoma, Texas?
4. Numbers of volumes in official series.	Determine, approximately, the modernness of a given official volume by the serial number.	What is the current highest number in Indiana, Illinois, Massachusetts, New York?
C. Judicial decisions:		
nation-wide reporter systems:		
	a. Locate cases given by title in the proper series and volume of the principal systems.	
	b. Translate into one system citations given in another system. (For further subdivisions, reference is made to Mr. Daly's course on the reporter systems.)	
D. Judicial decisions:		
digests, citators, and other finding apparatus:		
	a. Use the various finding apparatus to find desired authorities on a particular point.	

<i>Kind of Material Used</i>	<i>Operation Involved</i>	<i>Example Test for Operation</i>
	b. Trace a given cited authority to its place in the digest, etc. (For further subdivisions, reference is made to Mr. Daly's course on the digest system.)	
E. State legislation:	Discriminate between	Have the following states
1. Extent of codification.	states which do and do not base all their law, or parts of it, on codes.	codes, or only statutory compilations: Illinois, Indiana, Iowa, Georgia?
2. Subjects of codes.	Discriminate as to extent and varieties of subjects of codification.	How many, and what codes have the following states: Iowa, Georgia, Louisiana, New York?
3. Names of compilations.	Discriminate as to names of different compilations.	Is the name compiled, or revised, or general, or what other name, in the following states: Vermont, Massachusetts, U.S., Wisconsin?
4. Style of compilation.	Discriminate as to the system employed in the compilation, in grouping the material, and the mode of finding specific laws by index or contents.	Is the order of topics in the statutes of the following states merely alphabetical, or based on some scheme of juristic analysis—Illinois, Massachusetts, Wisconsin?
5. Official and unofficial compilations.	Discriminate as to the authority of different compilations, as official revisions, or official compilations, or private compilations.	In the following states, is the currently used compilation official or unofficial: Illinois, Massachusetts, New Mexico, New York?
6. Session laws: names.	Discriminate as to names given to annual enactments.	What is the official name of the annual laws in Massachusetts, Illinois, Virginia?
7. Session laws: citation.	Designate a specific law, so as to refer to the exact law-text desired.	How is a particular law cited in the following jurisdictions: Illinois, Massachusetts, Ohio?
8. Constitutions.	Locate the state constitution, and determine present validity as to later amendments.	Where is each state constitution to be found? Where can they all be found? What states have new constitutions since 1901? Where are consti-

<i>Kind of Material Used</i>	<i>Operation Involved</i>	<i>Example Test for Operation</i>
		tutional amendments published?
9. Revised statutes and session laws: Finding apparatus.	Find a law given by subject only, without date or other citation.	Where can be located the statute giving an action for death by wrongful act in Illinois, California?
<i>F. Federal Legislation:</i>		
1. Compilations.	Discriminate the several federal law compilations or consolidations.	What period is covered by the Federal Revised Statutes? The Federal Compiled Statutes? How find in the latter a citation to the former?
2. Annual laws: citation.	Discriminate as to authoritative sources of the annual legislation.	In what form are the Federal Annual Laws officially published? How is a federal statute cited?
3. Revised statutes and annual laws: Finding apparatus.	Find a law by subject only, without date or other citation.	Find and bring the Selective Service Act of 1917, in official source. Bring it in another source.
<i>G. Treatises:</i>		
1. Complete lists.	Use a working list for selection of treatises to be consulted.	Bring a list of the principal treatises on the following subjects, since 1880: Contracts, Torts, Damages.
2. Handbooks and reference books.	Discriminate between a handy elementary book and a complete reference work.	Bring an elementary and a reference work in the following subjects: Sales, Damages, Contracts.
3. Relative status as authority.	Discriminate between standard and ephemeral works.	Bring a standard work on the following subjects: Municipal Corporations, Eminent Domain, Patent Law.
4. Comparative use of general works.	Use books of different authors on same general subject for comparison of views.	Bring the following works, with a marker at the place of treating the same topic: <i>a.</i> Whether a release of a contract must be under seal, in Page and Williston; <i>b.</i> Whether a child can recover who enters railroad premises and is hurt at an unguarded turntable, in Jagard, Pollock, and Thompson.

<i>Kind of Material Used</i>	<i>Operation Involved</i>	<i>Example Test for Operation</i>
5. Comparative use of special works.	Use books on specialized parts of a general subject.	Bring, with Jaggard on Torts, six other books covering the special subjects of Defamation, Death by Wrongful Act, Unfair Competition.
6. Editions.	Discriminate between old and current editions.	Is Dillon the latest standard work on Municipal Corporations? Is Machen or Cook the latest work on Corporations? What is the date of the first and the last edition of Greenleaf on Evidence?
7. Supplementing a treatise by later authorities.	Discriminate as to up-to-date information to supplement the authorities cited in a treatise.	After perusing the authorities in 495 Wharton on Criminal Procedure, 10th ed., where would you begin, in searching for later <i>a.</i> statutes; <i>b.</i> decisions, in California, Illinois? Give year of statute and volume of reports and state reasons.
<i>H. Encyclopedias:</i>		
1. Varieties.	Discriminate in the scope of encyclopedias.	Bring one volume each of the principal encyclopedias now current on the topic, Fourteenth Amendment to the United States Constitution.
2. Use.	Discriminate in the reliance to be placed on the text and citation.	In the Cyclopedia of Law and Procedure, on the proposition that no action lies for fright alone, without illness, look up the citations and report how many are cited correctly to that point.
<i>I. Government Bureaus and Commissions:</i>		
1. United States government bureaus and commissions.	Find sources outside of court decisions and legislative acts.	Bring a ruling of the United States Land Office. Bring the decision of the Interstate Commerce Commission in the Trans-Missouri Freight Rate Cases.

Kind of Material Used	Operation Involved	Example Test for Operation
2. State bureaus and commissions.		Bring the Proclamation of the President Declaring War on Germany, April 6, 1917. Bring the latest volume of the United States attorney-general's opinions. Bring the latest volume of the Illinois Industrial Commission's Rulings. Where are the Minnesota Blue-Sky Law Commission's rulings reported? Where do you find the opinions of the Illinois attorney-general?

J. Periodicals:

1. Kinds.

2. Use.

Utilize the specific values of periodicals. Determine the various sources available.

Bring citations of three articles on the Right of Privacy, naming the author.

Find in three law journals an editorial comment on the case of United States v. United Shoe Machinery Co., 247 United States 32.

LEGAL BIBLIOGRAPHY

ANALYSIS OF DISTINCTIVE JOBS

IN A LAWYER'S PROFESSIONAL AND CUSTOMARY USE OF PRINTED LEGAL SOURCES

By JOHN H. WIGMORE¹¹⁷

1. *GIVEN*: The names of parties to a decided case in an appellate tribunal;

FIND: The citation of the report of that case.

Example: The "doctrine of the Debs Case" is referred to in discussion. *Find* the citation.

1a. An opponent's brief contains the following citation: "*Smith v. Jones*, 101 Ala. 230." There is such a case but the citation is apparently erroneous. *Find* the correct citation.

¹¹⁷ Dean and professor of law, Northwestern University Law School.

2. **GIVEN:** The *citation* of the *original report* of a case;
FIND: All *duplicate* or *collateral reports* of the same case.
Example: An opponent's brief names *U.S. v. Debs*, citing the C.C.A.; but your library does not contain the C.C.A. reports. *Find* the case in other series which perhaps you possess.
3. **GIVEN:** The *statement of a point of law* decided in a specific reported case not cited by name or volume or other clue;
FIND: The *citation* of the report.
Example: Your partner remembers once seeing a decision in a western state that a plea of truth was no defense in a civil action for libel, which is the point of law in your client's case. *Find* the citation of the case.
4. **GIVEN:** The *citation* of a *reported case*;
FIND: Cases where it has been *followed*, *overruled*, *reversed*, *distinguished*, or *explained*; (a) in the same jurisdiction; (b) in other jurisdictions of the U.S.
Example: *Adams v. U.S.*, 192 U.S. 985 (1904) is just the authority that settles your client's case; but is it still recognized in full force? *Find* later cases in the same court referring to it.
5. **GIVEN:** The *citation* of a reported case;
FIND: The status of that case in the esteem of recognized juristic authors, editors, and other commentators.
Example: *R. R. Co. v. Stout*, 17 Wall. 657, the first of the so-called "Turntable Cases", announcing the doctrine of "attractive nuisances" for children's injuries when trespassing. *Find* the status of that doctrine today among commentators, etc.
6. **GIVEN:** The *statement* of the effect or tenor of a *statutory provision*, not identified by volume or date or other clue;
FIND: The *citation* of the statute's authentic text.
Example: Your client is interested in a case (or a pending bill) involving larceny of cattle, and some friend tells you he understands that Colorado recently enacted the most stringent law on that subject. *Find* the Colorado statute.
7. **GIVEN:** The *citation* of a *statutory provision*;
FIND: The *interpretation* and *validity* of that statute as passed upon by the appellate court of the jurisdiction.
Example: Your client's case involves the foreclosure of a mortgage against an absent soldier, and you have been given the citation of the Wisconsin and Oregon statutes, which are like the one in your state, suspending proceedings against absent soldiers. *Find* the decisions in those states passing upon those statutes.

8. **GIVEN:** The *citation* of a *statutory provision*;
FIND: The present validity of that statute with reference to later legislation.
Example: Your client in Illinois, an insurance company, has a case arising under the California Workmen's Compensation, Safety, and Insurance Act. You have a handbook of 1914 giving the California Act of 1913. *Find* the present validity of its text under legislation to date.
9. **GIVEN:** The *terms* and citation of a *regulation*, ruling, or ordinance of an *administrative officer* or *municipal government*;
FIND: The *validity* of the *regulation*, etc., as dependent on the powers exercised.
Example: A municipal bond issue of 1915 by the City of Dubuque, Iowa, is submitted for your opinion. *Locate* the authentic report of the local referendum affecting the debt limit.
10. **GIVEN:** The terms of a statute, and its citation, in a particular jurisdiction;
FIND: For the purpose of comparison, the contemporary statutory provision on the same point in *other jurisdictions*.
Example: The Ohio Workmen's Compensation Act provides that in hearings before the Commission "the technical rules of evidence shall not apply." *Find* what other states have adopted a similar provision.
11. **GIVEN:** A *question of law* arising out of a particular state of facts, upon which legal advice is to be given as to a party's rights, duties, status, or remedies;
FIND: *All the sources of law* (excluding obsolete or merely historical sources) which bear directly upon that question of law in the jurisdiction concerned.
Example: Your client, a woman, has been elected mayor of a town. The principal point of law is whether a woman is eligible to the office of mayor. *Collect* all the sources of law on this point in your state.
12. **GIVEN:** A *proposition of law* (assumed to be today valid), depending on either judicial ruling or statute, or both, whose *prior tenor* is material to giving advice on the case in hand;
FIND: The sources which show the *prior tenor* of the rule on that subject, as far back as may be material.
Example: Your client claims land in Illinois thru a nonresident alien uncle, whose brother came to that state in 1850 and died in 1899. A state statute formerly forbade acquisition of land thru a nonresident alien; but that statute was changed or repealed in 1895. *Find* the sources showing the law from 1850 to 1895.

13. *GIVEN:* A legal doctrine, maxim, or principle;
FIND: Its origin; (a) legal; (b) historical.
Example: A judicial opinion cited against you refers to the principle that "common law copyright is lost by publication." *Find* (1) the original statute or decision declaring this doctrine; (2) the surrounding causes leading up to it.

14. *GIVEN:* A contemporary statute in any jurisdiction;
FIND: Its origin, by tracing it to (a) the parent statute; (b) the cause for its enactment, in public opinion, private interest, or the like.
Example: Your state legislature has just passed an act authorizing a judge to summon expert witnesses not summoned by the parties, and its constitutionality is questioned. *Find* (1) the parent statute in another state; (2) the reasons leading to its enactment.

15. *GIVEN:* A proposed measure to change existing law by legislation (whether a bill be yet pending or not);
FIND: The chief sources containing the arguments pro and con for the proposed measure.
Example: The Aircraft Club has caused an elaborate bill on aviation to be introduced in the legislature. The chamber of commerce retains you to furnish an opinion which will guide them as to supporting or opposing it. *Find* the arguments pro and con, its provisions in discussion elsewhere.

16. *GIVEN:* A legal rule in the domestic jurisdiction;
FIND: The rule on the same matter in another system of law (Roman law, French, Italian, Brazilian, etc., etc.).
Example: Your client is the widow of a well-to-do ex-service man, recently deceased, who married her in France under a French marriage contract. *Find* the French law sources, so as to advise her.

17. *GIVEN:* A legal rule;
FIND: Its position among philosophers, economists, publicists, etc., etc., (lay writers).
Example: A bill is pending to increase the percentage of the inheritance tax. Your clients represent interests which believe that the tax is already at the danger point, and retain you to argue before the legislative committee. *Find* the views of philosophers, economists, etc., on which to found your argument.

18. *GIVEN:* A topic of current legal discussion;
FIND: The articles in legal periodicals dealing with it.
Example: In preparing for an argument before a legislative committee, you have been told of an important article on the proposed division of Illinois into two parts; the informant thinks that the article appeared in the *Illinois Law Review*. *Find* the article.

CHAPTER XIX

READING REPORTED CASES AND STATUTES AND ABSTRACTING REPORTED CASES¹¹⁸

The Reports. The reports are generally, in the United States, the reports of proceedings in appellate courts, but they may be the reports of proceedings in trial courts; and they may be the reports of only a portion of the proceedings instead of all the proceedings in any particular litigation. A complete report of a case generally contains: the title of the case; headnote or syllabus; statement of the case; abstract of arguments of counsel; opinion or opinions of the court; and a statement of the disposition of the case.

Title. The title of a case in a trial court is made up of the names of the parties litigant, with a designation of the character in which they appear. Thus, in an action by John Brown against Peter Jones, the title would be *John Brown, Plaintiff, v. Peter Jones, Defendant*, or sometimes *In re Peter Jones*. On appeal, in the latter case, the title remains the same; but in the former, the title depends upon the jurisdiction. In some jurisdictions, the first name in the title on appeal is that of the one appealing. If Peter Jones, for example, should appeal, the title would appear *Peter Jones, Appellant (or Plaintiff in Error) v. John Brown, Appellee (or Respondent, or Defendant in Error)*. In other jurisdictions the order of the names of parties is not changed but only the designation. In such jurisdictions, even if Peter Jones should appeal, the title would remain *John Brown, Appellee (or Respondent, or Plaintiff-Appellee) v. Peter Jones, Appellant (or Defendant-Appellant)*. In the casebooks, placed in the hands of students for use in law schools, the title includes not only the names and designation of parties, but the date of the decision, and the book and page of the official report wherein the case was originally reported.

Headnote. The headnote or syllabus, which generally comes at the head of a report below the title, is sometimes made by a reporter and sometimes by the judge who writes the opinion for the court, and it is sometimes an abstract of the facts with a statement of the decision and sometimes

¹¹⁸ Morgan, *Introduction to Study of Law*; Wambaugh, *Study of Cases*.

only a statement of propositions of law for which the case stands. Headnotes are generally the materials used by digesters, but they are not part of the opinion, and may be inaccurate or absolutely wrong, and therefore should not be substituted for the opinion.

Statement of Case. The statement of the case, either by the reporter or by the court, usually precedes the opinion, but it is sometimes embodied in the opinion, either at the beginning, or middle, or end. The statement of the case should show the facts upon which the controversy turns, the manner in which the points in dispute were brought to the attention of the trial court, and the manner in which the case was brought to the reviewing court, if the report is an appellate court report.

Arguments of Counsel. At the present time it is usual to print the names of counsel, either preceding or at the end of the opinion, but to omit all reference to their arguments, but most of the older reports contain an abstract of the arguments of counsel.

Opinion. The opinion may be anonymous, when it is called in the United States a *per curiam* opinion. Ordinarily the opinion of the court is written by one member thereof, designated by the presiding judge or determined in some other way, but the different members of the court may write separate concurring opinions; and when the judgment of the court is not unanimous the judges who disagree frequently write dissenting opinions. There is no rule as to the length of the opinion or the style in which it shall be written. Two of our greatest judges have set opposite standards as to the length of opinions: Mansfield for shortness of opinions and Marshall for length.

Disposition of Case. At the end of the opinion there is made a brief statement of the disposition of the case, as "Case remanded", or "Judgment reversed", or "Order affirmed".

Authority of a Case. Any principles announced by a court upon any of the issues in a case are primary authority in any later cases involving the same issues in the same jurisdiction, and if the court is a court of last resort, inferior courts of the same jurisdiction will feel bound to follow them except under the most extraordinary circumstances. That is, an

opinion of a court in such jurisdiction has imperative authority in so far as it voices the principle actually dictated by the decision. This is the doctrine of the case, the proposition or propositions of law which usually follow a discussion and which are easily found and quoted. Any principles of law announced by a court on hypothetical cases put by way of illustration, or beyond the facts of the case, or upon collateral matters are only secondary authority. They are called *dicta*, or *obiter dicta*. So far as concerns authority they are in the same class with the opinions of text-writers and legal essayists and the doctrines of courts of other jurisdictions. An opinion is doctrine, and not *dictum* or *dicta*, not only where a court decides one point on one ground, but where it decides one point on more than one ground, or more than one point in favor of one party on different grounds, or one point one way and another another, or finds no errors where there are a number of suggested errors; but where there are discordant opinions, agreeing in result but differing as to grounds, or where an opinion ignores the point, or where there is no opinion at all it is difficult to find any doctrine for which the case stands.

Evaluating the Doctrine of a Case. Even tho an opinion may be doctrine within its own jurisdiction there are various circumstances which may affect its weight, either as primary authority within such jurisdiction or as secondary authority outside of such jurisdiction. It is necessary, therefore, for the student or lawyer to put the proper value upon the opinion. The circumstances affecting the weight of an opinion may be classified as those relating to the court, whether trial, intermediate, or appellate, whether obscure or well known, whether poorly educated or well educated; those relating to the judge, whether learned or "famously ignorant"; those affecting the report, whether official or unofficial; those affecting thoroughness of consideration, as lack of argument, or argument on only one side, or argument by weak counsel; those affecting the opinion, as failure to notice existing authorities, or opinion by a divided court; those relating to the economic, political, and social conditions of the time; those relating to the judicial history of the case, as whether it is a case of first impression, whether it has been modified or affirmed, whether it has been often cited, and whether it is in accord with the modern

trend of decisions; and those relating to its present applicability in the light of newly discovered truths and changed social policy.

Statutes. A complete statute contains its title, a preamble, and the body of the statute, otherwise called "purview", which includes the enacting clause, the interpretation clause, the saving clauses, and the repealing clause if any.

Interpretation. The authoritative principles derived from decisions are not written but are ascertained by the use of reason, and therefore case law is called unwritten law, tho found in written opinions; but in the case of statutes the rules are found in the very words of the statutes, which are therefore called written law. A decision is a judicial act, a statute a legislative act. Future decisions can be predicted much more surely than future statutes. Any work of the courts in elucidating the meaning of statutes takes the form of interpretation or construction. Statutory questions are settled, not by legal theory, but by verbal criticism. Hence whenever a statutory question is involved one should not depend upon his memory but should examine the very words of the statute. The purpose of interpretation is to ascertain the intention of the framers of the statutes, and to this end a number of rules have been evolved. First, there are rules which apply to all written instruments, as technical words are to be understood in their technical sense; words with changing meaning are to be construed as they were understood at the time; words are to be construed in connection with the context; all words are to be given meaning if possible; doubtful words are to be construed so as to make sense and not nonsense, justice and not injustice; words are to be construed so as to carry out the main purpose of the statute; clerical and grammatical errors are to be ignored if the meaning can be ascertained notwithstanding them; and punctuation may be appealed to as an aid to the sense. Second, there are rules which apply especially to statutes, as words are to be construed so as to make the statute valid if possible; words are to be construed so as not to give retroactive effect; penal statutes are construed strictly; remedial, liberally; the words of a statute are to be construed in the light of pre-existing law; words in a series of statutes are to be construed as if the series were one statute; and words of a statute will be construed not to

apply where the court takes judicial notice that they do not come within the legislative intent.

Evaluating Statutes. Circumstances strengthening or weakening the effect of statutes may be classified as those affecting its accuracy, and, to determine this, revisions should be compared with session laws and sessions laws with legislative records; those affecting its constitutionality, and for this various headings, like due process of law, commerce, etc., should be examined; those concerning subsequent legislation, superseding, repealing, or amending the statute; and those concerning constructions already made by decisions of courts.

Abstracting a Case. Both the student in preparing cases for report in the classroom and the practitioner in preparing cases for presentation in the courtroom should make careful abstracts of them. An abstract should contain the following parts arranged in the order indicated:

1. The title, date, and place where the case is reported.
2. A statements of the facts of the case. In addition, if the case is one which the student is studying in a procedural course, or if the point involved in the practitioner's case is a procedural point, there should be a statement of the manner in which the issue, or issues, were presented to the trial court, the disposition of the case made by the trial court, and the manner in which the case came before the appellate court if an appeal case.
3. A statement of the question, or questions, of substantive law involved in the facts. If the case involves procedural points or is being studied in procedural courses, the procedural questions should be stated.
4. The decision of the court deciding the case.
5. The reasons given by the court for the decision, that is, the doctrines of the case.
6. Any dicta or explanatory matter of which the abstractor desires to make a note.

Immediately following is given an illustration of how a case should be abstracted:

Adams et al. v. Lindsell et al., 1 B. & Ald. 681, (1818)

The defendants offered by mail to sell the plaintiffs wool at a certain price, "receiving your answer in course of post", but the defendants misdirected their letter so that it was delivered to the plain-

tiffs three days late. The plaintiffs mailed at once a letter agreeing to accept the wool on the terms proposed; but the day before receiving this letter, the defendants (thinking that the plaintiffs were not going to accept because they had not heard from them in what they thought the usual course of post), sold the wool to another, and refused to deliver it to the plaintiffs on the ground that they had made no contract with the plaintiffs because their offer had not been legally accepted. The plaintiffs then sued for breach of contract.

Was the plaintiffs' letter a valid acceptance of defendants' offer?

The court of King's Bench held that it was a valid acceptance and therefore that defendants were liable to the plaintiffs for the nondelivery of the wool to them, because

1. As a matter of interpretation, the plaintiffs answered in the course of post, because the delay in notification was due to the fault of the defendants.

2. The acceptance took effect the moment it was despatched, because the agreement required for a consensual contract is an objective agreement, not a subjective agreement, and there was an objective agreement (or expression of assent) in this case, either

- a. because the mail service may be regarded as the agent of the defendants, carrying their offer to the plaintiffs and receiving the plaintiffs' acceptance, so as to complete the agreement at that moment, on the theory that notice to the agent is notice to the principal; or

- b. because the offer of the defendants was an act which gave the plaintiffs the power to create an agreement by the acceptance of their conditional promise by despatching it by mail as the offer impliedly authorized them to do.

When Jervis obtained a rule *nisi* for a new trial he in effect secured an order to the adverse party to show cause why such relief should not be granted, and when the court discharged the rule it denied the relief. If the court had granted the relief prayed for it would have made the rule absolute.

Quere, Would the selling of the wool to other parties have amounted to a revocation of the offer in any event?

CHAPTER XX

BRIEF MAKING

Preliminary Work. When a person has a long argument to make, as a practitioner does in arguing a case before an appellate court, he needs more than an abstract of a case. He needs to have the abstracts of all the cases on his case cards which he has not discarded as worthless for his purposes; memoranda of quotations from opinions, textbooks, and legal periodicals; statistics in regard to economic and social facts (and for a trial brief a preliminary examination of witnesses); and a theory of his case in mind—all woven into a connected argument enforced by references to his authorities. The last work is brief making.¹¹⁹ A brief may be defined as “any abstract or memorandum intended as a guide in the trial (or argument) of a case”.

Kinds of Briefs. In England the brief is prepared by the solicitor for the use of the barrister, and contains only such matters as will indicate to the barrister the essential features of the case which he is to try. This would include an abstract of the pleadings, and an abstract of the evidence, together with the names of the witnesses and their peculiarities. The English brief tells what the case is, but does not argue it. In the United States, there are two kinds of briefs: the trial brief and the brief on appeal. The trial brief partakes somewhat of the nature of an English brief, but it goes further and contains a memorandum of the facts and the law. The brief on appeal is unlike both the trial brief and the English brief. It is generally a skeleton of the argument on the law, is prepared by the attorney who is to argue the case, and is intended for the guidance of the court more than counsel, whereas the English brief and trial brief are for the guidance of counsel only.

Trial Brief. A trial brief is a complete memorandum of one side of a lawsuit, prepared in an orderly way for the guidance of a trial attorney, following as nearly as possible the sequence of events which the trial is expected to follow, and containing all the information necessary to enable him

¹¹⁹ Sunderland and Redfield, in *Brief Making*; Lawyers' Coöperative Publishing Co., *Law Books and their Use*.

properly to introduce his evidence in accordance with the issues and his theory of the case and to present the law in support of that theory. It should, therefore, in addition to the title of the case, contain:

1. A statement of the issues, or abstract of the pleadings;
2. A schedule of the facts which must be proved to support the case;
3. A synopsis of the evidence—oral and documentary—to be adduced by the various witnesses and papers with the names of each;
4. A statement of the facts which the adversary must prove in order to support his defense;
5. The statute or statutes, if any, relied upon;
6. The authorities in support of the attorney's theory of the case, and those against the theory of his adversary;
7. Prayers for instructions that the court will be asked to give the jury, each on a separate page.

The importance of the trial brief cannot be overemphasized. It is too frequently neglected by United States trial attorneys. It not only aids the attorney in the proper preparation of his case for trial, but it helps him in the orderly conduct of the same, prevents his omitting some important step in the heat of the trial, and enables him to make a better impression upon client, court, and other attorneys by his readiness to cite authorities fully to sustain every contention which he may find it necessary to make in connection with every phase of his case. The trial brief may also be of use after the trial is over in making motions for a new trial or in arrest of judgment and in preparing a brief on appeal if any appeal is taken.

Brief on Appeal. A brief on appeal, or appeal brief, is a complete memorandum of a legal controversy, for the guidance of an appellate court, giving the facts out of which the controversy arose, the decision of the lower court, the grounds upon which a review is asked, and the reasons why the trial court should be reversed or affirmed. The rules of the Supreme Court of the United States and of most state courts prescribe the contents of a brief. In general they provide that the brief shall contain: the title of the case, a preliminary statement, a statement of facts, an assignments of errors, the questions involved, the argument, and a conclusion.

Title of the Case. The title of the case should name the appellate court, the number of the case, the names and designation of the parties, and the name of the brief, whether for appellant or respondent.

Preliminary Statement. The preliminary statement should show how the case comes before the appellate court and from what court it is brought.

Statement of Facts. The statement of facts should be a story, or bare outline, of the case, giving the leading controlling facts, but no evidence, and the main contentions between the parties, in clear, concise, and absolutely accurate language. If a knowledge of the pleadings is necessary a synopsis of these should be given.

In complicated cases it may be well to precede the statement of facts with a statement of the issues or questions of law involved; otherwise this statement should follow the specification of errors.

Assignment of Errors. The assignment, or specification, of the errors which it is claimed the lower court has committed should be made under an appropriate heading, each separately stated in as few words as possible, and each separately numbered.

In some jurisdictions a formal assignment of errors must be prepared and filed in the appellate court to give it jurisdiction, but this does not dispense with its repetition in the brief.

Only such errors as have been made the basis of an assignment of errors can be argued upon appeal, and none should be alleged by the appellant except those which he believes the appellate court will deem ground for reversal. He should not allege errors of the trial court in excluding evidence if such evidence was subsequently admitted, or that a fact was proved by the wrong evidence if it was proved, or that incompetent, irrelevant, or immaterial evidence was admitted if no injury resulted, because judgment will be affirmed where the errors complained of were not prejudicial, or where the appellate court believes that the same result would have been reached if no errors had been committed. It is not the business of the appellant to educate the trial court but to obtain a reversal, if he believes that the trial court should be reversed.

The Supreme Court of the United States requires that when the error alleged is the admission or rejection of evidence the specification of error must quote the full circumstances of the evidence; that if the error assigned is the charge of the court, the exact language must be quoted; that if an instruction granted or refused is complained of, the instruction must be quoted.

Questions Involved. If not stated before the statement of facts, the points, or questions to be decided, or questions of law raised in the case, should be set forth, after the assignment of errors, separately and numbered, in short, pithy phrases. As few points as possible should be set forth, but, if necessary, these can be subdivided into subheads. The best arrangement is to put the strongest point first, the weakest in the middle, and the next to the strongest last.

Argument. A point will not be considered unless a fair effort is made to show that the court below was wrong. Hence an attorney must argue every point which he cares to have an appellate court consider. Counsel should not only show the appellate court what the case is about and what the questions before it are, but they should aid the court in reaching a correct conclusion. To do this they should produce the legal principles which they believe applicable and show how they should be applied to the facts in the case. All propositions of law should be supported by authorities, and stated with the utmost fairness and accuracy. If textbooks are cited, volume, page, paragraph, and edition should be given. The full citation of a case should be given whenever mentioned. Cases from other jurisdictions as well as his own should be cited. To cite a digest is an unpardonable sin. If a statute is relied upon, it should be inserted in full, unless too long, when the particular portion involved should be included. The argument should close with a clear, forceful summary, repeating the points and the reasons therefor.

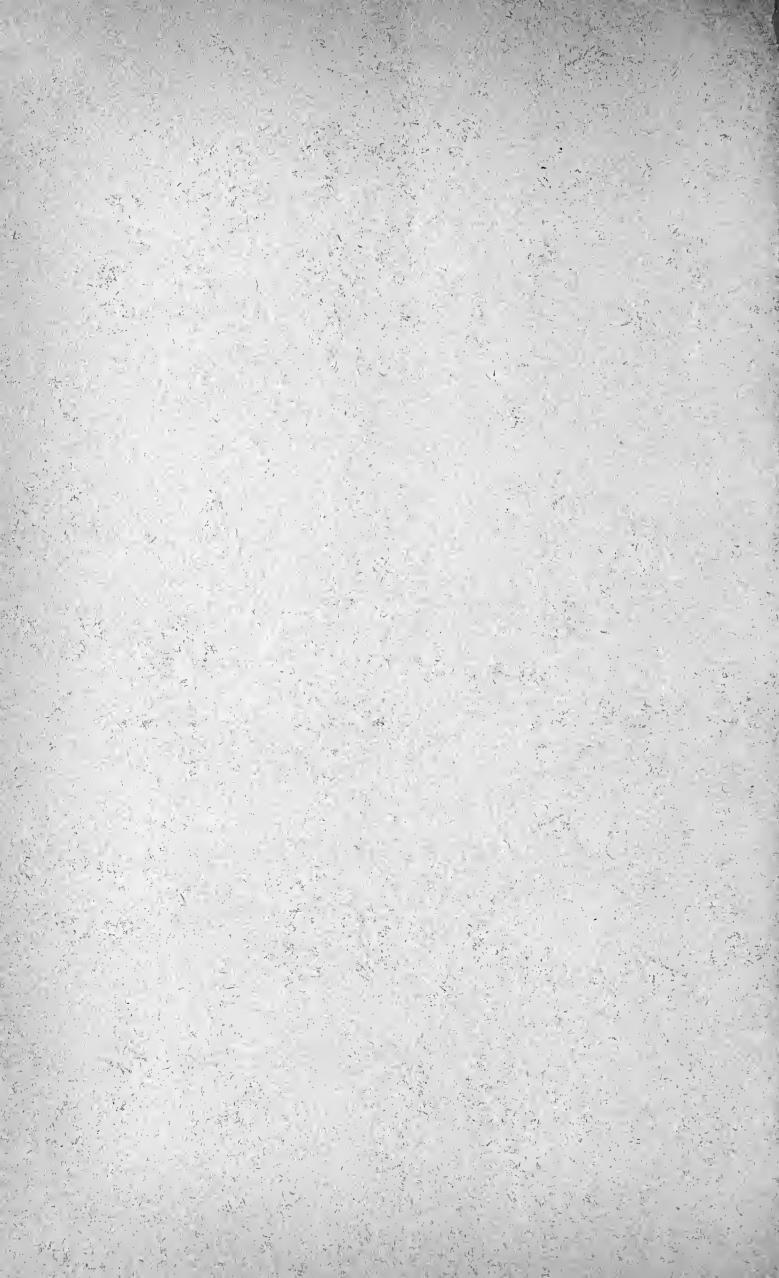
If the questions involved are independent they should be kept distinctly separate by the use of numerals. Separate arguments frequently consist of a chain of propositions. A brief should show the main propositions and the points within a main proposition. This can be done both by the use of numerals and letters and by the use of different kinds of type.

Conclusion. A brief should close with a respectful submission of the case to the court, with a request for reversal or affirmance, and with the name of counsel who appear on that side.

Counsel should bear in mind that in a brief, as in diamonds, it is quality not quantity that counts. They are not paid, like fiction writers, at so much per word, but for the ideas they can transmit to paper. This applies not only to the argument but also to the statement of facts and of the questions involved. If the appellate court clearly understands the facts and the questions the case may not need much argument. Accuracy in citation and in argument should be a point of honor. The appellant should remember that upon him rests the burden of convincing the appellate court that reversible error was committed by the trial court, and that he cannot do this by general assertions; he must call any error to the attention of the court, point out why he thinks it is error, and give his reasons for thinking so. The appellee should correct any misstatements of facts in the appellant's brief, or if he has not had a chance to examine it state the facts in his brief, and take up each point made by the appellant in the order named, analyzing and if possible refuting the authorities cited by him. A reply brief should be what its name indicates, and not some of the argument which should have been disclosed in the main brief. However, this does not mean that the appellant should in his main brief anticipate the arguments of his opponent. Both parties should remember that verbosity is not appropriate in a brief; they should leave illustration and amplification for oral argument.

We have now set forth fairly completely the technical rules for finding, reading, and briefing authorities—the oracles of the law—as they are found in the sibylline leaves of the myriads of law books found in a well-equipped law library; but we have said very little about the greatest rules which should guide the lawyer here as everywhere else in his practice, and those are the moral rules of life. It is as important for a lawyer to put character as to put intellect into his work. In no profession are moral ideals and standards more important than in that profession whose almost Godlike work is the administration of justice on earth. No attempt will be made to set forth the moral rules of life as they apply to the

work of the legal profession, as the intellectual rules have been set forth; but if the lawyer will remember that in practicing law he is not only earning a livelihood for himself and family but that he is performing a high social service in helping to prevent wrong social relations and to readjust them so as to make them right after they have become wrong, he will never offer his legal services for sale to the highest bidder; nor place technicality above justice; nor do anything else corrupt, untruthful, or unfair to obtain a victory for a client or to make the future law of his country what it ought not to be: but instead he will always try to find the best principles that are to be found in the law books, to give the court the arguments that he believes to be the best, and in every way to do the best he can for his client, for society, and for the law.



INDIANA UNIVERSITY STUDIES



Study No. 70

THE PRESENT STATUS OF INTEGRAL EQUATIONS.

By HAROLD THAYER DAVIS, Assistant Professor of Mathematics,
Indiana University.

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By HAROLD THAYER DAVIS, Assistant Professor of Mathematics,
Indiana University.

The Present Status of Integral Equations*

By HAROLD THAYER DAVIS, *Assistant Professor of Mathematics in Indiana University.*

1. Introduction. The development of the branch of mathematics called "analysis" has centered in large measure around problems which have arisen in connection with the solution of functional equations. The most important class of such equations and the first to be studied was very naturally that in which derivatives of the unknown function appeared. But it must remain one of the curiosities of the evolution of mathematical science that more than two hundred years elapsed after the discovery of integral calculus before functional equations involving the unknown function under signs of integration were generally recognized as adding a new chapter to analysis and a powerful tool to the hand of the investigator in applied science.

Altho little more than a quarter of a century has passed since the work of Volterra and Fredholm first called general attention to integral equations, the development of the subject has been so rapid and complete that these equations are already challenging the place of differential equations in the work of applied science. It is hazardous to predict, yet one cannot help but observe that in the discontinuous behaviour of atomic radiation there is a serious threat to those who must state all laws of physics by means of differential equations. Thus Poincaré, in discussing the theory of quanta radiation, says:† "It is useless to remark how far removed this concept is from our customary ideas, since the laws of physics will no longer be susceptible of being expressed by means of differential equations."

The modern theory of integration is admirably adapted to the treatment of the discontinuous behaviour of functions, and if differential equations shall ultimately prove unable to cope with the modern theory of radiation, it is highly improbable that these laws cannot be expressed by means of integral equations.

*Presented at the meeting of the Indiana section of the Mathematical Association of America, May, 1925, at Bloomington.

†Comptes Rendus, vol. 153 (1911) p. 1103.

In order to indicate the progress of this new branch of analysis and to show the broad scope of its problems, it would seem that a short historical summary might be of value. The Bibliography at the end will show that there are now plenty of technical treatises available for workers in this field, but because of the rapid development of the subject and the numerous topics which it embraces, these must all be limited in both content and point of view.

The admirable treatment of the history of integral equations prepared by Professor H. Bateman for the British Association for the Advancement of Science gives an exact and complete account of the development of the subject up to 1910. In the present essay, therefore, the emphasis has been placed upon the extension and progress of the theory since that time. Each year in the past quarter of a century has seen important new developments, and the subject seems to be an almost inexhaustible mine for research workers in mathematics.

2. Classification of Equations. By an integral equation in its general sense is meant any functional equation in which the unknown function appears under one or more signs of integration, and by its order the highest number of dimensions of any integral which occurs in it. For example

$$f(x) = \int_0^{\infty} \cos xt \, u(t) \, dt, \quad u(x) = f(x) + \lambda \int_0^1 (x-t) e^{-u(t)} \, dt,$$

$$u(x) = f(x) + 2\lambda \int_0^{\sqrt{x}} \frac{u(t)}{\sqrt{x-t}} \, dt,$$

are integral equations of first order in a single variable and

$$u(x,y) = f(x,y) + \lambda \int_a^b \int_a^b \log[(x-s)^2 + (y-t)^2] u(s,t) \, ds \, dt,$$

is an integral equation of second order in two variables.

It is clear from the examples just given that further classification is desirable; hence any equation in which the unknown function enters to the first degree only has been called a *linear integral equation* and all others *non-linear integral equations*.

Linear equations may be divided further into four classes for convenience of reference altho it will be seen that the general theory of the third class will include the first two and the general theory of the second class will include the preceding one. Thus we mean by a *Volterra equation of first kind* the following integral equation,

$$f(x) = \lambda \int_a^x K(x,t) u(t) dt, \quad (1)$$

and by a *Volterra equation of second kind*,

$$u(x) = f(x) + \lambda \int_a^x K(x,t) u(t) dt. \quad (2)$$

Similarly we may classify the equation

$$f(x) = \lambda \int_a^b K(x,t) u(t) dt \quad (3)$$

as a *Fredholm equation of first kind* and

$$u(x) = f(x) + \lambda \int_a^b K(x,t) u(t) dt \quad (4)$$

as a *Fredholm equation of second kind*.

We should note that the general theory of the Fredholm equation will include that of the Volterra equation as well, since it is only necessary in the Fredholm equation to choose a function which will equal $K(x,t)$ for $t < x$ and which will be identically zero for $t \geq x$. In the general case this introduces a line of singularities along $t = x$, but functions of this type are not excluded in the theory.

D. Hilbert has suggested that the equation

$$h(x) u(x) = f(x) + \lambda \int_a^b K(x,t) u(t) dt$$

should be called a Fredholm equation of third kind. But when $h(x)$ is different from zero for x taken between the limits a and b this equation is no more general than (4). On the other hand, the case where $h(x)$ vanishes in the interval (a,b) corresponds to the case where $f(x)$ and $K(x,t)$ of (4) have singularities in x and it seems preferable to call it the *singular Fredholm equation* of second kind. Under this name also equations are included in which at least one of the limits of the integral is infinite. Similar remarks apply to the Volterra case.

The third type of equation, characterized by the fact that the limits of the integral are functions of x , might be properly named after G. Andreoli, who first gave a general discussion of its properties. It is obvious that the *Andreoli equation*

$$u(x) = f(x) + \lambda \int_{g(x)}^{h(x)} K(x,t) u(t) dt$$

will include both the Fredholm and Volterra equations as special cases.

A fourth type of linear equation, first introduced by A. Kneser, who derived it from certain problems in mechanics, has been generally called the *mixed integral equation*. It is of the form

$$u(x) = \sum_{i=1}^n \varphi_i(x) u(\xi_i) + \int_a^b K(x,t) u(t) dt,$$

where $\xi_1, \xi_2, \xi_3, \dots, \xi_n$ are any distinct points in the interval (a,b) .

Another class of functional equations that have considerable importance in applied problems are those to which Volterra has given the name of *integro-differential equations*. These in the general case include the unknown function under one or more signs of integration and as a derivative.

By a *solution* of an integral equation is meant a function which, when substituted in the equation, reduces it to an identity.

3. Types of Kernels. To the function $K(x,t)$ has been given the name *kernel* (French, *noyau*; Italian, *nucleo*; German, *Kern*). The quantity λ is called the *parameter* of the equation.

Since the characteristics of solutions of integral equations are largely determined from the characteristics of their kernels, it has been found desirable to classify linear equations by means of some of these important properties.

Thus by a *symmetric kernel* is meant one which has the property

$$K(x,t) \equiv K(t,x)$$

and by a *skew-symmetric kernel* one in which we have

$$K(x,t) \equiv -K(t,x).$$

Two kernels are called *orthogonal* if they satisfy the two conditions

$$\int_a^b K_1(x,t) K_2(t,y) dt = 0, \quad \int_a^b K_2(x,t) K_1(t,y) dt = 0,$$

and *semi-orthogonal* if only one of these conditions is satisfied.

If a kernel is symmetric and possesses the additional property that $I \geq 0$, where

$$I = \int_a^b \int_a^b K(x,y) h(x) h(y) dx dy,$$

no matter what function $h(x)$ may be, provided only that it has an integral square, then the kernel is called *positive*, and if $I \leq 0$, it is called *negative*. If $I > 0$ or if $I < 0$, then the kernel is called *definite*.

If $K(x,y)$ is a symmetric kernel and if there exists no function $h(x)$ such that

$$\int_a^b K(x,t) h(t) dt \equiv 0,$$

then $K(x,y)$ is called a *closed kernel*.*

By a *Schmidt kernel* is meant one of the form $A(x) \cdot B(y) S(x,y)$ where $S(x,y)$ is a symmetric function and $A(x)$ and $B(y)$ are of one sign in the rectangle $A \leq x \leq B$, $a \leq y \leq b$.

Kernels of the form

$$K(x,y) = \sum_{i=1}^n X_i(x) Y_i(y)$$

are called *bilinear kernels*.

4. The Origin of Integral Equations.† The first phase in the historical development of integral equations centered around the question of the inversion of integrals. As early as the end of the eighteenth century and with increasing frequency in the early part of the next, problems presented themselves in differential equations, mechanics, and other applied subjects in the form of equations of the following type,

$$f(x) = \int_s K(x,t) u(t) dt,$$

where $f(x)$ was a known function, $u(t)$ a function to be determined and S a path in the complex plane, usually the axis of reals.

The credit for the first example in this new calculus apparently goes to Laplace,‡ who in 1782 studied the equation

$$f(x) = \int_s e^{xt} u(t) dt$$

in connection with linear difference and differential equations. Abel¹⁹⁸ later employed this equation in the more general form

$$f(x,y,z,\dots) = \int_s e^{xu+yv+zp,\dots} \varphi(u,v,p,\dots) du dv dp \dots,$$

and developed a number of the fundamental properties of the Laplace transformation, altho no general method for finding its solution is indicated.

The work of Abel and Laplace has been the inspiration of a number of memoirs on this type of equation. E. Borel§, for example, has made it of fundamental importance in his theory of divergent

*We here exclude all null-functions, i.e. discontinuous functions which are zero except at the points of a set of measure zero. Complete generality is not obtained in theorems on closed kernels without the use of Lebesgue integrals.

†For a comprehensive historical outline to 1910 consult H. Bateman, ref. 4. The author is greatly indebted to this paper. In the pages that follow reference numbers refer to the titles listed in the bibliography.

‡Oeuvres, vol. 10, p. 235.

§Lecons sur les séries divergentes, Paris (1901).

series, and his summation formula is essentially a solution of the Laplace equation when S is the real axis from 0 to ∞ . P. Humbert²¹⁶ published results for a more general type of equation in which e^{xt} is replaced by $f(x,t)$, and J. R. Carson⁷⁸ recently found an application for the Laplace equation in the theory of electric circuits, indicating its intimate connection with the operational calculus of Heavyside. M. Lerch* in 1892 discussed the homogeneous case where $f(x)$ is identically zero and the integral is taken along the real axis from zero to infinity.

We are also indebted to Laplace for the integral equation

$$f(x) = \int_s t^{x-1} u(t) dt,$$

which Riemann† used in his classical researches on the distribution of prime numbers and which is important in investigations on the law of error. J. Liouville⁴⁸² as early as 1837 considered the existence theorem for the homogeneous problem

$$\int_a^b x^n u(x) dx = 0, \quad n = 1, 2, 3, \dots$$

which is of importance in connection with the uniqueness of solutions of the non-homogeneous equation. This equation was further studied by C. Severini²³⁸ who made use of it in connection with the closure property of orthogonal functions.⁴⁸⁸

After the work of Laplace one of the most noteworthy discoveries in the history of integral equations in spite of its appearance so early in the development of the theory was made by J. Fourier in his memoir on the "Theorie du mouvement de la chaleur dans les corps solides" which, altho crowned by the French Academy in 1812, was not published until ten years later. Here for the first time appears the integral equation

$$f(x) = \int_0^\infty \cos xt u(t) dt,$$

and, with proper restrictions on $f(x)$ ‡, the remarkable inversion formula

$$u(t) = \frac{2}{\pi} \int_0^\infty \cos xt f(x) dx.$$

To enumerate the various researches to which these equations have led would be to review a large chapter in modern mathematics,

*Acta Math., vol. 27 (1903), pp. 339-351. First published, Rozprawy ceské Akadamie, 2d class, vol. 1, no. 33.

†Werke (Weber), Leipzig (1892), p. 149.

‡For example, $\int_0^\infty |f(x)| dx$ converges.

but perhaps the most important generalization for which they are responsible is the theory of the Fredholm equation of first kind.

To Abel¹⁹⁸ belongs the credit of having given in 1823 the first solution of the equation now known by his name,

$$f(x) = \int_c^x \frac{u(t)}{(x-t)^\alpha} dt \quad \alpha < 1.$$

The inversion formula,

$$u(t) = -\frac{\sin \alpha \pi}{\pi} \frac{d}{dx} \int_c^x \frac{f(t)}{(x-t)^{1-\alpha}} dt,$$

is one of the best known results of the early period in integral equations and has led to a number of generalizations and applications. It is closely connected with Riemann's operator for fractional differentiation and integration.^{79, 81} The equation had been previously obtained, tho not solved, by S. Poisson* in the problem of the distribution of temperature in a conducting sphere, and J. Liouville† in 1832 connected it with his theory of fractional derivatives. Three years later and independently of Abel he also gave a solution of the equation in the form in which it appeared in the work of Poisson.‡ A general treatment of the problem was given by R. Murphy in 1833, who studied it in connection with questions in electrostatics§.

At about this same time both Liouville and Poisson were led to another problem which represented a real generalization of that of the inversion of an integral. In 1826 Poisson|| obtained an equation of the form

$$g(x) = u(x) - \frac{4\pi k}{3} \int_0^x f'(x-t) u(t) dt,$$

which he succeeded in solving by expanding $u(t)$ in powers of the parameter k . The convergence of the resulting series was not established until later.

Altho J. Caque in 1864¶ introduced integral equations into the discussion of a method for solving linear differential equations, and other investigators in applied fields incidentally found themselves confronted by the necessity of determining an unknown function under a sign of integration, it was apparently not recognized before 1888 that these functional equations presented a new problem in analysis which was worth a systematic study of its own. In that

*Journal de l'école polytechnique, (1821, vol. 19), p. 299.

†Ibid. (1823, vol. 21), p. 9.

‡Ibid. (1835, vol. 24), pp. 55-60.

§Cambr. Phil. Trans. vol. 5 (1833), pp. 113-148, 315-394.

||Mémoire sur la théorie du magnétisme en mouvement. Oeuvres, vol. 3, no. 5, pp. 41-72.

¶Méthode nouvelle pour l'intégration des équations différentielles linéaires. Journal de math., vol. 29 (1864), pp. 185-222.

year, while discussing Laplace's differential equation, P. du Bois-Reymond* reduced his problem to one in integral equations and then made the following remark:

I write down these equations not as if they solve the problem or even carry it nearer to a solution; they serve only as examples of the fact that in the boundary value problem of linear partial differential equations one is continually faced by this type of problem which still, for the analysis of today, presents in general insurmountable difficulties. I propose to give to these very useful problems the name of *integral equations*.

5. The Modern Development. With V. Volterra, T. Levi-Civita, and J. Le Roux begins the modern development of integral equations which has made such rapid strides under the impetus of their work. Le Roux²²¹ in 1895 gave a solution of the equation

$$f(x) = \int_c^x K(x,t) u(t) dt$$

with certain restrictions on the kernel, obtaining his results by means of successive approximations.

The same year Levi-Civita²²² considered the case of the solution of both the Fredholm and Volterra equations of first kind with a kernel of the form $K(x-y)$. In the latter case he obtained the elegant result that, with proper restrictions on the kernel and the known function, the solution is of the form,

$$u(x) = \text{the real part of } \int_0^\infty dt \int_0^\infty \frac{f(z)}{\psi(t)} e^{i\pi t(z-x)} dz,$$

where we have

$$\psi(t) = \int_0^\infty K(s) e^{i\pi st} ds.$$

Altho Volterra† eleven years before had commenced his study of integral equations, his work did not mature before 1896 when, in a series of papers celebrated both for the completeness with which they discharged the problem and the novelty of the methods employed, he gave the first general treatment of the problem of inversion of integrals.^{251, 252} It appears to have been Volterra who, in these memoirs, first pointed out the remarkable connection which exists between the theories of linear algebraic and linear functional equations. Altho Sturm in his great memoir of 1836 in the first volume of *Liouville's Journal* was led to some of the results on the properties of solutions of a linear differential equation by considering the limiting form taken by the solution of a difference equation

$$L_i u_{i+1} + M_i u_i + N_i u_{i-1} = 0, \quad (i = 0, 1, 2, \dots)$$

*Journal für Mathematik, vol. 103 (1888), p. 228.

†Sopra un problema di elettrostatica, Atti dei Lincei, vol. 8 (3), (1884), pp. 315-318.

which is essentially a system of linear equations, no elaboration of the method appears anywhere in his published work.

In Volterra's words the following principle seems to underlie the theory of both linear functional and linear algebraic equations:*

To any problem, algebraic or differential, whose solution leads to a function expressed as the quotient of entire functions of a certain number of variables, there corresponds an integral or integro-differential problem whose solution is wholly expressed by means of the quotient of entire functions of the same variables. Two such problems are called *correlative* and it is possible to pass from the solution of one to that of the other.

Thus the integral equation

$$u(x) = f(x) + \int_0^x K(x,t) u(t) dt,$$

can be thought of as the limiting form of the equation

$$u(x) = f(x) + \sum_{i=1}^n K(x, t_i) u(t_i) \Delta_i, \quad (5)$$

as $n \rightarrow \infty$, where the t_i are n equally spaced points in the interval $(0, x)$, $t = 0$, $t_n = x$, and $\Delta_i = t_i - t_{i-1}$.

In a similar way equation (5) may be thought of as the limiting form of a system of algebraic equations

$$u(t_j) = f(t_j) + \sum_{i=1}^{j-1} K(t_j, t_i) u(t_i) \Delta_i, \quad (j = 1, 2, \dots, n)$$

for which a solution exists of the form

$$u(t_j) = f(t_j) + \sum_{i=1}^{j-1} k(t_j, t_i) f(t_i) \Delta_i, \quad (j = 1, 2, \dots, n).$$

By considering the value of this solution as $n \rightarrow \infty$, Volterra was able to determine a limiting form for $k(t_j, t_i)$ and thru it arrived heuristically at a function $u(x)$. That this was a solution of the original integral equation he was able to show by direct substitution.

R. D. Carmichael† has recently examined in detail this method of arriving at solutions of transcendental problems thru the limiting form of algebraic systems and has indicated its scope and power by deriving oscillation, comparison, and expansion theorems for various types of functional equations.

It was I. Fredholm who first used this new tool in the integral equation which bears his name.‡ The first of these papers appeared in 1900 under the title: "Sur un nouvelle methode pour la resolution

*Ref. 292, p. 84.

†Algebraic Guides to Transcendental Problems. Bull. Amer. Math. Soc., vol. 28 (1922), pp. 179-210.

‡It is interesting to note that Fredholm himself proposed the name "équation fonctionnelle abélienne" for the equation of first kind. Ref. 137, p. 365.

du probleme de Dirichlet"³⁴ and was followed three years later by an elaboration of these results in a second memoir: "Sur une classe d'equations fonctionnelles" which is now classic in the theory of the Fredholm equation.¹³⁷ The equation solved by Fredholm presented a difficulty which did not appear in Volterra's problem since, in the former case, the determinant of the algebraic system was not always different from zero and required, necessarily, that the limiting form of the solution should be a meromorphic function of the parameter. Thus the solution of the Fredholm equation (4) appeared in the form

$$u(x) = f(x) + \int_a^b \frac{D(x,t;\lambda)}{D(\lambda)} f(t) dt,$$

where $D(x,t;\lambda)$, called *Fredholm's first minor*, and $D(\lambda)$, called *Fredholm's determinant*, are entire functions of λ .

It was Fredholm's notable discovery that corresponding to those values λ_i , the so called *characteristic values* of the equation, for which $D(\lambda) = 0$, there existed solutions of the homogeneous equation and these solutions were actually $D(x,t;\lambda_i)$. In a paper of considerable elegance L. Tocchi¹⁶⁹ has shown that $D(x,t;\lambda_i)$ can always be factored into two factors $v(x) w(t)$ so that the extra parameter is a parameter only in appearance. The results of both Fredholm and Tocchi are readily extended to the case where $D(\lambda) = 0$ has multiple roots.*

The proof of the convergence of the λ -series representation for $D(\lambda)$ which Fredholm obtained depended essentially upon a theorem due to J. Hadamard on the maximum value of a determinant.²⁸⁰ This theorem has played an important part in much of the work involving infinite determinants, and a number of independent proofs have been given for it.

Shortly after the appearance of the Fredholm papers, D. Hilbert commenced the publication of a series of memoirs in the *Göttinger Nachrichten* on the "Foundations of a General Theory of Integral Equations." The first of these appeared in 1904 and the last in 1910.⁹ One of the most noteworthy achievements of these papers was the formulation of the Sturm-Liouville boundary value problem of differential equations in terms of integral equations and another the remarkable connection established between integral equations and bilinear and quadratic forms in an infinite number of variables. This subject was extensively developed by M. Mason²⁷³ in his thesis published in 1903.

One of the important extensions of the work of Hilbert in connection with the Green's functions of differential equation systems

*See Heywood-Fréchet: L'équation de Fredholm, ref. 8, footnote p. 73.

was due to G. D. Birkhoff.⁸⁹ In a paper published in 1908 Birkhoff discussed for a very general case the existence and distribution of characteristic numbers and the nature of the expansion of an arbitrary function in terms of the associated system of bi-orthogonal functions. This memoir has already become a classic in connection with the Sturm-Liouville problem.

The papers of Volterra, Fredholm, and Hilbert now gave new stimulus to the study of infinite determinants and systems of equations in an infinite number of variables which had already been advanced a long way, notably by G. W. Hill, P. Appell, H. Poincaré, and H. Von Koch. To this theory important additions have been made by D. Hilbert, E. Schmidt, H. Hellinger, O. Toeplitz, E. Hilb, F. Riesz, and more recently by J. V. Walsh.* For an extended account of the development of this important subject and its numerous applications the reader is referred to the monograph of Riesz.†

With the completion of the fundamental theorems in the theory of both the Volterra and Fredholm equation, attention was next directed to a study of the characteristics of solutions as they depend upon the characteristics of the kernel and the development of arbitrary functions in series of the orthogonal and bi-orthogonal functions which furnish solutions of the homogeneous Fredholm equation.

The latter problem, frequently met with in applied mathematics, is that of developing an arbitrary function in terms of a system of functions, orthogonal in an interval (ab), i. e. functions

$$u_1(x), u_2(x), \dots, u_n(x), \dots$$

which satisfy the condition

$$\int_a^b u_i(t) u_j(t) dt = 0, \quad i \neq j.$$

In a formal manner it may be assumed that an arbitrary function, $f(x)$, can be expanded in terms of these functions

$$f(x) = c_1 u_1(x) + c_2 u_2(x) + \dots + c_n u_n(x) + \dots \quad (6)$$

and the coefficients calculated from the equation

$$\int_a^b f(t) u_i(t) dt = c_i \int_a^b u_i^2(t) dt.$$

Various questions suggest themselves in this connection, however. First: can $f(x)$ really be represented by series (6)? Second: to what extent does the series converge? Third: is the representation of a function by means of series (6), if it exists, unique? Fourth: is

*Amer. Journal of Math., vol. 42 (1920), pp. 91-96.

†Les systèmes d'équations linéaires à une infinité d'inconnues. Gauthier-Villars, Paris (1913) 182 pp.

the function $f(x)$ which corresponds to an arbitrary set of coefficients, $c_1, c_2, \dots, c_n, \dots$, unique?

* Altho these questions have been the subject of numerous investigations since the work of Fourier, Sturm and Liouville first brought the problem to the attention of mathematicians early in the nineteenth century, E. Schmidt⁴²⁸ in his dissertation in 1905 opened up a new and fruitful field of investigation in this direction. In his theory of orthogonal and bi-orthogonal systems of functions connected with integral equations and his development of the properties of an equation with a symmetric kernel, he has set up a model which has guided investigators to some of the most elegant theorems in the subject. The work of Mrs. Pell³⁶⁹ on bi-orthogonal functions, and that of M. Plancherel,⁴²⁴ A. Kneser,⁴¹³ W. Myller-Lebedeff,⁴²¹ and H. Weyl⁴³⁰ on various representations of arbitrary functions should be especially mentioned.

Closely associated with this line of research is the Fischer-Riesz theorem, independently discovered by E. Fischer³⁶⁴ and F. Riesz³⁷³ in 1907, which is fundamental in the theory of the closure properties of the kernel of the Fredholm equation of first kind. In this connection, also, we should mention the existence theorem for the homogeneous equation of first kind which has been, in particular, the subject of investigations by G. Lauricella²¹⁹ and C. Severini²³⁹.

After the problem of the inversion of indefinite integrals had been brought to so successful a solution by Volterra, and with the work of Schmidt to serve as a guide, it was natural to expect developments next in the theory of the Fredholm equation of first kind. Altho there had been previous contributions to the subject in the form of isolated examples, the real foundation was laid by E. Picard in a series of articles the first of which appeared in 1909.^{228, 60} The names of L. Amoroso,²⁰¹ G. Lauricella,²¹⁹ and A. Vergerio²⁴⁶ are among the important contributors to the recent theory of this equation.

From about 1907 the number of memoirs on integral equations rapidly increased. Different types of kernel were studied, and specific solutions for a number of equations important in practice were recorded. In this connection the papers of H. Bateman and G. H. Hardy made noteworthy contributions. J. Mercer¹⁹⁶ did fundamental work with functions of positive and negative type and showed how the classical theorems on definite quadratic forms have important generalizations in the theory of integral equations.

E. Goursat¹³⁹ and H. Lebesgue¹⁵¹ developed the Fredholm theory for bilinear kernels. The former gave a preliminary discussion of the subject and the latter extended it to the limiting case where the

kernel was assumed to be a bilinear form in an infinite number of variables.

It may be shown that the *genre* of the Fredholm determinant $D(\lambda)$ is at most one for the case of continuous kernels.¹⁶² It is important to notice that, for finite bilinear kernels, the *genre* is zero since $D(\lambda)$ reduces to a polynomial.

6. Generalizations. Generalizations of many kinds followed. E. Schmidt,³⁵⁸ T. Lalesco,²⁸⁷ A. Vergerio,³⁵⁹ and G. Bratu³⁴⁹ studied inclusive types of non-linear equations and stated existence theorems with more or less generality.

In his work on the non-linear problem, Schmidt studied equations of the form

$$u(x) + \int_0^x K(x,t) u(t) dt + \Sigma \int_0^x \dots \int_0^{t_n-1} K(x, t_1, t_2, \dots, t_n) u(t_1)^{\alpha_1} \dots u(t_n)^{\alpha_n} h(t_1)^{\beta_1} \dots u(t_n)^{\alpha_n} h(t_n)^{\beta_n} dt_1 \dots dt_n = 0,$$

where the sum is extended over a set of integral values α_i , β_i , one at least of which is assumed to be different from zero.

Lalesco's equation was similar in character, involving powers of the unknown function under the integral sign. Thus he considered existence theorems for the equation,

$$u(x) = f(x) + \int_0^x [K_1(x,t)u(t) + K_2(x,t)u^2(t) + \dots + K_n(x,t)u^n(t)] dt.$$

Vergerio introduced the notion of linear operators into his equation which he wrote in the form,

$$u(x) = f(x) + \lambda \int_a^b K(x,t) L(u) dt.$$

where $L(\)$ designates a general operator satisfying the linearity conditions:

$$\begin{aligned} L(u + v) &= L(u) + L(v), \\ c L(u) &= L(cu).^* \end{aligned}$$

Bratu, while considering very general types of non-linear equations, also made fundamental contributions to the study of the important special cases

$$u(x) = f(x) + \lambda \int_0^1 K(x,t) u^2(t) dt,$$

and

$$u(x) = f(x) + \lambda \int_0^1 K(x,t) e^{u(t)} dt.$$

*The degree of generality of this equation can be readily appreciated from the work of S. Pincherle and C. Bourlet who have shown that $L(u)$ is equivalent to a differential operator of infinite order. Pincherle: *Mémoire sur le calcul fonctionnel distributif*. Math. Annalen, vol. 49 (1897), pp. 325-381; Bourlet: *Sur les opérations en général et les équations différentielles linéaires d'ordre infini*. Annales de l'école normale supérieure, 3d ser., vol. 14 (1897), pp. 133-190.

One of the most general functional equations involving integrals that has appeared in the literature is due to H. Galajikian,³⁵³ who has made some progress in the existence theorem for the equation

$$u(x) = g(x, \varphi_1, \varphi_2),$$

where $\varphi_i = \int_a^x f_i [x, t, u(t)] dt$.

However, in a problem of this generality, the structure of the theorems has become so tenuous, that they are of little value in applied mathematics. Much important work, however, remains to be done in the case of special equations and the nature of these problems might profitably be indicated by the functional equations that arise in application.

A. Kneser,³⁴² W. A. Hurwitz,³⁴¹ and G. Andreoli³³⁸ are responsible for the development of the theory of the mixed integral equations (called by Kneser "belastete integralgleichungen") and the latter has shown how it can be included under the theory of the general Fredholm equation if certain singularities are introduced into the kernel. In an important memoir which appeared in 1914 and in subsequent shorter papers, Andreoli has developed many of the properties of the general equation associated with his name.³³⁶

Several special kinds of equations which involve the unknown function under signs of integration have been studied in addition to the standard types already mentioned. A few of these and the names of those chiefly responsible for their development are tabulated below.*

Authors	Equations
E. Bounitzky, U. Crudeli, G. Fubini, J. Horn, G. Lauricella, S. Pincherle, C. Platrier.	$u(x) = f(x) + \sum_{i=1}^n h_i(x) u^{(i)}(x) + \sum_{i=0}^m \int_a^b K_i(x, t) u^{(i)}(t) dt$
P. J. Browne.	$h(x)u(ax) = f(x) + x^n g(x) + \lambda \int_a^1 K(x, t) u(xt) dt$ $g(0) \neq 0, h(0) = c.$
E. Cesaro.	$u(x) = f(x) + \frac{2}{\sqrt{\pi}} \int_{\frac{1}{\sqrt{x}}}^{\infty} \frac{1}{t^2} e^{-t^2} dt$
P. Nalli, C. Popovici.	$u(x) = \lambda [g(x) u(ax) + \int_0^x N(x, t) u(t) dt + \int_0^{ax} P(x, t) u(t) dt] + f(x)$
G. Polya, C. Runge.	$f(x) = \int_{-\infty}^{\infty} u(t) u(x-t) dt.$

*For references see Bibliography, X.

The first of these equations will be seen to be an example of the type which Volterra classified under the name of integro-differential equations. Important extensions, suggested by problems in elasticity, hereditary mechanics, electrodynamics, etc., have been made by Volterra³²⁵ in the form of equations in several variables, as for example,

$$\frac{\partial^2 u(t)}{\partial x^2} + \frac{\partial^2 u(t)}{\partial y^2} + \frac{\partial^2 u(t)}{\partial z^2} + \int_0^t \Sigma \frac{\partial^2 u(s)}{\partial x^2} f_1(t,s) ds = f(x,y,z,t)$$

$$\text{where } u(t) \equiv u(x,y,z,t) \text{ and } \Sigma \frac{\partial^2 u(s)}{\partial x^2} f_1(t,s) = \frac{\partial^2 u(s)}{\partial x^2} f_1(t,s)$$

$$+ \frac{\partial^2 u(s)}{\partial y^2} f_2(t,s) + \frac{\partial^2 u(s)}{\partial z^2} f_3(t,s).$$

In the exploration of this field the Italians, under the stimulus of Volterra, have taken a leading part.

Another development closely connected with the subject of functional equations in general, and integral equations in particular, is that which has arisen from the idea of "functions of lines." This line of thought was first set forth by Volterra in 1887 in a paper under the title "*Sulle funzioni che dipendono da altre funzioni*"* and has reached maturity in a volume published in 1913.¹⁹¹ In Volterra's words the idea may be explained as follows:†

An ancient problem, that of Zenodorus, has been to find among the plane curves of given length that which encloses the largest area. Now, if we study this isoperimetric problem and regard a plane area as depending upon the curve which encloses it, we have a quantity which depends upon the form of a curve, or, as we say today, a *function of a line*. Since a line is able to be represented by an ordinary function, the area can be regarded as a quantity which depends upon all the values of a function. It is evidently a function of an infinite number of variables. In fact, we are able to look upon it as the limiting case of a function of several variables by supposing that their number increases without limit, in the same way as a curve can be regarded as the limiting case of a polygon whose number of sides increases to infinity.

In the analytical treatment of problems involving functions of lines, as for example elastic and magnetic hysteresis, Volterra was led in general to integral and integro-differential equations.

T. Lalesco in 1908 made an original contribution to integral equations which deserves special mention. In the second part of his thesis, "*Sur l'équation de Volterra*"²⁸⁷ which appeared in the *Journal de Mathématique*, he has pointed out the connection existing between integral equations and differential equations of infinite order.

*Atti dei Lincei (1887), (2), pp. 97-105, 141-146, 153-158.

†Ref. 191, p. 14.

This idea was not entirely a novel one since Pincherle and Bourlet* in 1897 had shown that the inversion of a linear functional operator led to the integration of a differential equation of infinite order. However, no use of the idea was made until Lalesco's paper established its connection with integral equations. Thus he considered a Volterra equation of first kind (1) with a kernel developable in the following series:

$$K(x,t) = a_0(t) + a_1(t) \frac{(t-x)}{1!} + \dots + a_n(t) \frac{(t-x)^n}{n!} + \dots$$

Assuming that $\lim_{n \rightarrow \infty} f^{(n)}(x) = F(x)$ existed, Lalesco showed that equation (1) could be replaced by a differential equation of infinite order:

$$\lim_{n \rightarrow \infty} \left\{ [a_0(x) u(x)]^{(n)} - [a_1(x) u(x)]^{(n-1)} + \dots + (-1)^n [a_n(x) u(x)] \right\} = F(x),$$

with initial conditions on $u(x)$ and its derivatives determined from an auxiliary infinite system of linear equations in an infinite number of unknowns.

The ideas developed in this paper were later extended to include equations of Fredholm type²⁸⁹ and to the closely related subject of integral equations of infinite order,²⁸⁸ i.e. equations of the form,

$$u(x) + a_1(x) \int_1 u(t) dt + a_2(x) \int_2 u(t) dt^2 + \dots = F(x).$$

This new method in integral equations lay dormant, however, until 1918 when, in an extensive paper, F. Schürer²⁹¹ elaborated the ideas of Pincherle, Bourlet, and Lalesco and applied them to an extended class of functional equations. This paper was the starting-point for a series of papers by E. Hilb† and O. Perron‡ which considered the integration of special types of equations and their application to the solution of linear difference equations.

Hilb introduced the novel idea of connecting the solution of a differential equation of infinite order with the solution of a set of equations in an infinite number of variables. Thus he derived a linear system by means of an infinite number of differentiations of the original equation and then made use of the methods of the Hilbert-Schmidt theory to obtain a solution. This method of attack has been employed by H. T. Davis²⁸⁶ in discussing the Euler differential equation of infinite order which is associated with various types of singular integral equations.

*Loc. cit. See Bourlet's memoir, p. 178.

†Mathematische Annalen, vol. 82 (1920-21), pp. 1-39; vol. 84 (1921), pp. 16-30, 43-52; vol. 85 (1922), pp. 89-98.

‡Ibid., vol. 84, pp. 31-42.

Generalizations of the integral equation problem were made in another direction by extending the definition of integration to include the integrals of Stieltjes and Lebesgue. With this work are associated the names of G. C. Evans, E. W. Hobson, E. E. Levi, W. H. and Grace C. Young and more recently C. A. Fischer.*

The postulational foundations of the theory of integral equations was examined by E. H. Moore⁷⁵ in 1910 and the methods of general analysis used to describe the basic principles which underlie the theory. To quote Professor Moore:

The existence of analogies between central features of various theories implies the existence of a general theory which underlies the particular theories and unifies them with respect to those central features.

In this characterization the property of linearity plays an essential role.

Another somewhat similar generalization of the problem of integral equations is found in the calculus of *permutable functions* and *functions of composition*.

Two continuous functions $K^1(x,y)$, $K^2(x,y)$ are called *permutable* if they satisfy the relation:

$$\int_x^y K_1(x,t) K_2(t,y) dt = \int_x^y K_2(x,t) K_1(t,y) dt.$$

The preceding operation is called the *composition* of the two functions, and the resulting function a *function of composition*.

Such functions were first studied by Volterra in connection with the solution of the Volterra equation of second kind. Thus he showed that the solution of equation (2) can be written in the form

$$u(x) = f(x) + \lambda \int_a^x f(t) k(x,t) dt,$$

where we have made the abbreviations,

$$k(x,y) = K_1(x,y) + \lambda K_2(x,y) + \lambda^2 K_3(x,y) + \dots$$

and

$$K_n(x,y) = \int_y^x K_{n-1}(x,t) K(t,y) dt.$$

The fundamental theorem which states that if $K(x,t)$ is integrable over the triangle $a \leq t \leq x \leq b$, we shall have

$$K_n(x,y) = \int_y^x K_i(x,t) K_{n-i}(t,y) dt$$

for all values of i less than n , shows that $K_i(x,y)$ and $K_{n-i}(x,y)$ are permutable. The function $k(x,y)$ belongs to the class of functions of composition.

*See ref. XIX of the Bibliography.

Volterra used permutable functions in a problem in integro-differential equations in 1910,³⁹⁴ and in a set of lectures delivered at Rice Institute in 1919⁴⁹⁰ he formulated a calculus of such functions whose application extended far beyond the linear equation which suggested it.

For an elegant exposition and correlation of these various generalizations the reader is referred to the Cambridge Colloquium lectures of G. C. Evans delivered to the American Mathematical Society in 1916.*

Another natural development in the theory arose from the problem presented by the singular integral equation. The ordinary methods of Volterra and Fredholm were found inadequate to solve various problems which naturally arose and to explain curious phenomena which appeared in them. As early as 1896, W. Wirtinger† had pointed out the existence of *band spectra*, or lines of values of the characteristic parameter for which there existed solutions of a differential equation with linear boundary conditions. This theory was investigated from the standpoint of integral equations by Hilbert in 1906⁹ and its application extended to differential equations by E. Hilb,⁴⁷⁹ M. Plancherel,⁴²⁴ and H. Weyl.‡ E. Hellinger in 1909§ extended Hilbert's work by considering the point and band spectra of a general quadratic form.

Important contributions to the subject of the singular equation of Volterra type were made by G. C. Evans⁴³⁶ in a series of papers which appeared from 1909 to 1911 in which existence theorems were stated with considerable generality for various kinds of kernels. E. Picard⁴⁴⁸ performed a similar service for the Fredholm equation, and the case of the Volterra equation of first kind was treated in an elegant manner by the combined work of V. Volterra, E. Holmgren,²¹³ T. Lalesco,²⁸⁷ and J. Horn.²¹⁵ The work of the latter was devoted to a problem in the inversion of integrals which is analogous to the problem presented by differential equations with irregular singular points.

In spite of the researches in this direction, however, the possibilities of the singular equation are still far from exhausted. In most of this work special kinds of solutions are specified in advance, and as these restrictions are removed, new and novel difficulties

*Functionals and their Applications. Selected Topics, including Integral Equations. Cambridge Colloquium Lectures. Amer. Math. Soc. (1918).

†Math. Annalen, vol. 48 (1896), p. 387.

‡Über gewöhnliche Differentialgleichungen mit Singularitäten und die zugehörigen Entwicklungen willkürlicher Funktionen. Math. Annalen, vol. 68 (1910), pp. 220-269.

§Neue Begründung der Theorie quadratischer Formen von unendlichvielen Veränderlichen. Journal für Math., vol. 136 (1909), pp. 210-271.

present themselves. In his work on the potential problem where corner points are admitted in the boundary of the region, O. D. Kellogg⁴⁴³ found that the Fredholm series failed to converge and the singular equation had to be examined by a different method. Integrals in which Cauchy's principal value was used were studied in this connection by Kellogg and Hilbert. A general theory of inversion formulas connected with integrals of which the principal value must be taken has been given by G. H. Hardy.³⁰² H. Villat,²⁹⁸ in a memoir which appeared in 1916, studied the Fredholm equation with singular kernel from this point of view.

The theory of integral equation has been greatly broadened by work which has been done in connection with the *analytic integral equation*,

$$u(x) = f(x) + \int_s \frac{P(x,t)}{N(x,t)} u(t) dt, \quad (7)$$

where $P(x,t)$ and $N(x,t)$ are functions analytic in two complex variables in the regions R and R' , $f(x)$ is a function analytic in R except for a finite number of poles, and S is some path of integration between two fixed points α and β in R' . In particular α and β may coincide and the path of integration be a circuit as in Cauchy's formula, or the path may be composed of one or more loop circuits.

It is interesting to note that if the kernel is $\frac{1}{t-x}$ and S is a circuit about x , then $\lambda = \frac{1}{2\pi i}$ is a characteristic value for the homogeneous equation, corresponding to which any analytic function of x is a solution. The analytic case of the Fredholm equation is clearly included in equation (7) when α and β are real and the path of integration is the real axis.

Important investigations have been made for the analytic equation by E. Picard,²⁵⁸ and D. Pompeiu.²⁹⁷ In a recent article G. Julia²⁹⁴ has applied ideas of Hermite to obtain further insight into the character of its solutions.

The numerical solution of integral equations has not been neglected altho, with increasing use, there is need for greater development along this line. F. L. Hitchcock and E. T. Whittaker (see section XXIII of the Bibliography) have contributed methods of attack. Hitchcock's method applies to a Fredholm equation with interval $(0,1)$, while Whittaker considers Volterra equations of first and second kinds for kernels of the form $K(x-t)$. In the equation of first kind he considers the case where $K(x) = x^{-p} \sum_{n=1}^{\infty} a_n x^n$, $0 < p < 1$, and for the equation of second kind he develops the

theory for kernels expansible in a power series and also of the form $K(x) = \sum_{n=1}^n a_n e^{pnx}$.

7. Applications. Side by side with the purely theoretical studies of integral equations, we find an ever growing number of memoirs devoted to the application of these equations to applied problems. We have already indicated how integral equations presented themselves early and naturally in connection with differential equations of mathematical physics. Consequently, after the solutions of Volterra and Fredholm appeared, the dilemma of Du Bois-Reymond no longer existed, and to change a problem from a differential equation to an integral equation was to bring it under a theory rich in new methods and results.

The general tendency in the study of an applied problem has been to continue to use the methods of the pioneers. The physical situation is first formulated as a differential equation, the problem then converted by means of a Green's function to one in integral equations, and the resulting equation used as a bridge to the solution. But in his study of the kinetic theory of gases, D. Hilbert⁴⁴ has taken a more fundamental point of view. He goes directly from the physical problem to an integral equation and asserts, further, that this direct use of integral equations is essential in the foundation of the theory. He says, in part:*

In all of the applications of the theory of integral equations which we have discussed up to the present time—whether they were analytic or geometric problems or problems in the field of theoretical physics—there was always an ordinary or partial differential equation or a system of such differential equations which served us by intervention in setting up the integral equation. In the following I make a new, direct application of the theory of integral equations, for I show that there is a certain linear integral equation of second kind with symmetric kernel which forms the mathematical foundation of the kinetic theory of gases and without whose investigation according to the modern methods of the theory of integral equations a systematic foundation of the theory of gases is impossible.

Further extensions of this idea should be looked for in the future application of integral equations. The concept of "rate of change" is fundamental both in differential equations and in the relations between the physical properties of matter, so that it has been natural to express physical laws by means of derivatives. But the notion of "summation" seems to be just as fundamental in a study of the phenomena of nature, so that we would naturally expect to be able to pass from a physical problem to one in integral

*Ref. 9, p. 267.

equations as easily as we formulate the same problem in a differential equation with boundary condition.

Thus we might study the problem of kinematics in the spirit of Volterra and Fredholm as follows:

Let us designate by $u(t)$ the distance passed over by a moving particle after a lapse of t seconds. Dividing the time interval into n parts, Δt_i , during each one of which the velocity, $v(t)$, is approximately constant, we shall have as an approximation to $u(t)$, the sum,

$$u_n(t) = \sum_{i=1}^n v(t_i) \Delta t_i.$$

As n increases indefinitely the sum may be replaced by the integral,

$$u(t) = \int_{t_0}^t v(t) dt. \quad (8)$$

Supposing the particle to have an initial displacement u_0 at $t=t_0$ we can replace (8) by the more general formula:

$$u(t) = u_0 + \int_{t_0}^t v(t) dt. \quad (9)$$

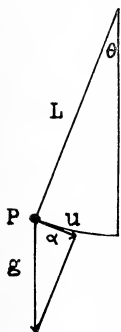
By a similar argument $v(t)$ can be calculated in terms of a variable acceleration $\alpha(t)$,

$$v(t) = v_0 + \int_{t_0}^t \alpha(t) dt. \quad (10)$$

Combining (9) and (10), we shall have

$$u(t) = u_0 + v_0(t - t_0) + \int_{t_0}^t (t - s) \alpha(s) ds. \quad (11)$$

The application of equation (11) is easily shown in the problem of the simple pendulum.



The displacement, u , of the bob, P , in terms of θ is

$$u = L \theta.$$

The acceleration effective in the motion of the pendulum is

$$\alpha = -g \sin \theta.$$

Let us suppose an initial displacement of $u_0=L\theta$,

and an initial velocity $L\omega_0$. Then from (11) we shall have

$$\theta(t) = \theta_0 + \omega_0 t - \lambda \int_0^t (t-s) \sin \theta(s) ds, \quad \lambda = g/L.$$

This integral equation, is non-linear, but could be solved by methods already existing in the literature. Assuming, however, that for small values of θ , $\sin \theta$ may be replaced by θ , we shall have a Volterra equation of second kind,

$$\theta(t) = \theta_0 + \omega_0 t - \lambda \int_0^t (t-s) \theta(s) ds.$$

The resolvent kernel for this equation is easily calculated to be

$$k(t,s) = -\frac{1}{\sqrt{\lambda}} \sin \sqrt{\lambda} (t-s),$$

so that the solution appears in the form,

$$\begin{aligned} \theta(t) &= \theta_0 + \omega_0 t - \sqrt{\lambda} \int_0^t \sin \sqrt{\lambda} (t-s) (\theta_0 + \omega_0 s) ds, \\ &= \frac{\sqrt{\lambda \theta_0^2 + \omega_0^2}}{\sqrt{\lambda}} \sin (\sqrt{\lambda} t + \gamma), \quad \text{where } \gamma = \arcsin \frac{\sqrt{\lambda} \theta_0}{\sqrt{\lambda \theta_0^2 + \omega_0^2}}. \end{aligned}$$

We have already indicated how Fredholm was led to his discoveries from a study of the Dirichlet problem in the theory of potential functions. This problem may be briefly stated as follows:

Along a curve C , enclosing a region S , a continuous function $f(s)$ is given. A function $u(x,y)$ is sought which, together with its partial derivatives of first and second orders, is continuous within the region S and satisfies Laplace's equation

$$\frac{\partial^2 u}{\partial x^2} + \frac{\partial^2 u}{\partial y^2} = 0,$$

and upon the boundary C , assumes the given value $f(s)$. The existence and uniqueness of a solution for this problem are the essential points.

The associated Neumann problem is that of finding a function $v(x,y)$, satisfying the same conditions as $u(x,y)$ with the exception of the last one, which is replaced by the condition that the normal derivative along C shall assume the given value $f(s)$.

Complexities arise when the character of the curve C is modified and we have already mentioned the investigations of Kellogg and Hilbert in connection with curves admitting corner points. G. Berrand,²⁶ G. Lauricella,⁵⁰ P. Lévy,⁵¹ E. Picard,⁵⁷ J. Horn,¹⁰ H. B. Heywood,⁸ M. Frechet,⁸ and J. Plemelj⁶⁴ are among others who have made important contributions to this subject.

G. Bertrand* and H. Poincaré have applied integral equations to the theory of the tides and J. Hadamard to water waves. Poincaré studied, also, the diffraction of Herzian waves by this method, and T. Hayashi applied it to the Cauchy problem of the telegraphy equation. G. Herglotz and P. Hertz used integral equations in the theory of electrons. Thermoelasticity has been formulated in terms of integral equations by L. Koschmieder and H. Laudien, and as early as 1837 J. Liouville used them in the phenomena of thermo-mechanics.

J. A. Carson in a series of important papers^{493, 494} has renewed interest in the operational calculus of O. Heavyside which has been used effectively but with admitted lack of rigor in circuit problems in electricity. Carson's contribution has been in connecting the theory of this calculus with an integral equation of Laplace type. The Heavyside theory depends essentially upon an operational equation of the form $h=1/H(p)$, where p is symbolically equivalent to the differential operator $\frac{d}{dx}$. Carson has shown that this equation is equivalent to an integral equation of the form $1/pH(p)=\int_0^\infty h(t) e^{-pt}dt$ and has found its solution for a variety of functions. One interesting feature of the theory is the occurrence of asymptotic series representing the solution of the original circuit problem. It seems that this application of integral equations is likely to renew interest in the formal operational calculus. Indications of this trend are to be seen in the use of fractional derivatives and integrals in the solution of integral equations⁷⁹ and in recent important contributions to the subject of general operators and the Heavyside Calculus by N. Wiener† and E. G. Berg.‡

E. Picard and R. Marcolongo have written general articles on the applications, and A. Kneser, in his treatise, has studied extensively problems in the conduction of heat and the theory of vibrations. To the first of these problems an important addition was made by H. S. Carslaw in 1912, and to the latter H. Weyl, in 1912, and E. Trefftz, in 1922, contributed the results of new researches. In 1906 Fredholm founded a theory of spectrum lines, reducing the problem to one in integral equations. Three years later C. Schaefer modified the theory in some essential details.

The study of H. Bateman in a mathematical theory of retail

*For references see section I of the Bibliography.

†The Operational Calculus. *Math. Annalen*, vol. 95 (1926), pp. 557-584.

‡Heavyside's Operators in Engineering and Physics. *Journal Franklin Institute*, vol. 198 (1924) pp. 647-702.

trade, the applications of E. Baticle to problems in the stability of structures, C. Charlier's investigation of terrestrial refraction and the composition of the atmosphere, and the discussion of T. Hayashi on the theory of diffusion of mixed gases indicate the broad class of problems to which the new theory can be applied.

The latest application to be made of integral equations is found in the mathematical theory of economics. This study has been initiated by G. C. Evans,⁴⁷⁸ C. F. Roos,⁴⁹¹ and H. Hotelling,⁴⁹² and gives promise of laying the foundations of a new and more exact science of economics. To quote from Professor Evans: "There is not only an opportunity for mathematicians in economics, but even a duty; and on the mathematicians in an unusual degree lies the responsibility for the economic welfare of the world." Hotelling has founded a theory of depreciation which leads to a Volterra equation of second kind with a kernel of the form $K(x, t) =$

$$B(t) e^{-\int_x^t f(s) ds}.$$

A promising application of integral and integro-differential equations has been made by Volterra in the study of problems in so-called *hereditary mechanics*, which includes the phenomena of elastic and magnetic hysteresis. The name and definition are due to E. Picard, whom we quote as follows:*

In all this study [of classical mechanics] the laws which express our ideas on motion have been condensed into differential equations, that is to say, relations between variables and their derivatives. We must not forget that we have, in fact, formulated a principle of *non-heredity*, when we suppose that the future of a system depends at a given moment only on its actual state, or in a more general manner, if we regard the forces as depending also on velocities, that the future depends on the actual state and the infinitely neighboring state which precedes. This is a restrictive hypothesis and one which, in appearance at least, is contradicted by facts. Examples are numerous where the future of a system seems to depend on former states: here we have *heredity*. In some complex cases one sees that it is necessary, perhaps, to abandon differential equations and consider functional equations in which there appear integrals taken from a distant time to the present, integrals which will be, in fact, this hereditary part. The proponents of classical mechanics, however, are able to pretend that heredity is only apparent and that it amounts merely to this, that we have fixed our attention upon too small a number of variables. But the situation in this case is just as it was in the simpler one, only under conditions that are more complex.

The following example from Volterra† will help to clarify this idea. We know from elementary physics that the relation, to a first

*La Mécanique classique et ses approximations successives. *Revista di Scienza*, vol. 1 (1907), pp. 4-15. In particular, p. 15.

†Ref. 19, pp. 138-139, and 150.

approximation, between the couple of torsion, P , and the angle of torsion, W , is given by the linear equation,

$$W = k P, \quad (12)$$

where k is a physical constant.

But it is reasonable to suppose that W does not depend merely upon the present moment of torsion, but upon all preceding ones as well. The elastic body has experienced fatigue from previous distortions and, in this way, has inherited characteristics from the past. We may express this analytically by saying that $W(t)$ is a function of a line.

When $W(t)$ is developed according to the calculus of such functions, equation (12) is replaced by the integral equation,

$$W(t) = k P(t) + \int_{t_0}^t K(t,s) P(s) ds,$$

where $K(t,s)$ is the *coefficient of heredity*.

Assuming that $W(t)$ and $P(t)$ are both periodic functions of the time with the same period, Volterra shows that the coefficient of heredity is then of the form,

$$K(t,s) = K(t-s).$$

Experimental evidence for the existence of a true hereditary coefficient has been sought for, but results so far obtained are not conclusive.

Here again as in the work of Hilbert we see integral equations in their application superseding differential equations as a tool of greater power and generality. How far these new equations are destined to replace the methods which have been standard in mathematical physics and astronomy for two centuries is one of the interesting questions to be answered by the future of mathematical research.

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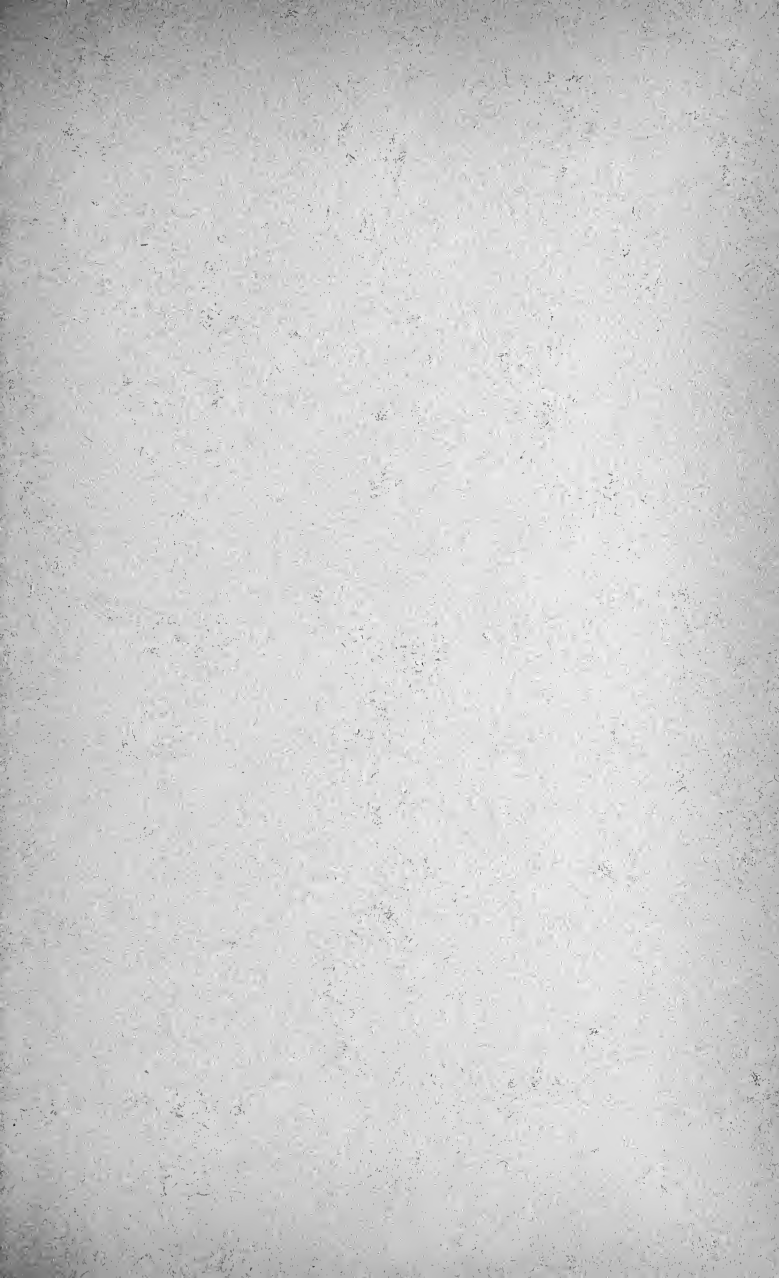
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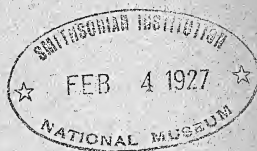
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INDIANA UNIVERSITY STUDIES



Study No. 71

EARLY REFERENCES TO STORM AND STRESS IN
GERMAN LITERATURE. By EDWIN H. ZEYDEL, Ph.D.,
Associate Professor of German, University of Cincinnati.

Study No. 72

THE TRANSFORMATION OF BOTTOM. By JOHN ROBERT
MOORE, Ph.D., Associate Professor of English, Indiana
University.

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Prefatory Note

THE following paper grew indirectly out of the writer's interest and studies in the works of Ludwig Tieck, the Romanticist. Being familiar with Tieck's essay on Lenz and with the generally prevalent belief that the term "Sturm und Drang," as a designation for the literary movement, owes its inception to this essay, the writer was impelled to investigate the basis upon which our accepted notions of "Sturm und Drang" rest. It is hoped that the early references to the period which have been gathered from various sources in the course of this investigation will throw some light upon the history of the period and particularly upon the genesis of the name by which it is most widely known.

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Early References to Storm and Stress in German Literature

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University of Cincinnati

I

PRESENT-DAY writers on Storm and Stress, the revolutionary movement that dominated German literature during the decade from 1770 to 1780, generally take the current designation of the period, "Sturm und Drang," for granted. If they go into an explanation of its provenience at all, they usually content themselves with the remark that the term, originally applied to a play of Maximilian Klinger, was later extended to refer to the entire movement, which was so typically represented by Klinger's drama. The following examination of some of the more recent works touching upon Storm and Stress will serve to disclose this attitude.

Hermann Hettner in his *Geschichte der deutschen Literatur im 18. Jahrhundert*, 3. Buch. 1. Abteilung, Die Sturm- und Drangperiode,¹ speaks of the period merely as

. . . jene leidenschaftliche Erregung der Geister, welche wir als Sturm- und Drangperiode zu bezeichnen gewohnt sind (pp. 1-2).

Later, in discussing Klinger, he only says in passing:

Es ist sehr bedeutsam, dass gerade der Titel eines Klinger'schen Dramas, Sturm und Drang, der Epoche den Namen gegeben hat (p. 260).

More information he does not offer.

In his excellent Introduction to Klinger in volume 79 of Kürschner's *Deutsche National-Literatur*, August Sauer goes somewhat farther. He says:

Es ist kein Zufall, dass das tollste Stück Klingers das berühmteste wurde und der ganzen Periode den Namen gab. Ursprünglich der "Wirrwarr" genannt, setzte Kaufmann die beiden Schlagwörter "Sturm und Drang" vor, die Lavater zuerst in dieser formelhaften Verbindung gebrauchte (p. x).

¹ 3. Auflage, Braunschweig, 1899.

A. Wohlthat in his *Zur Charakteristik und Geschichte der Genieperiode*,² goes back in his title and discussion to the other designation of the movement, altho of course the name "Sturm und Drang" is also quite familiar to him. Richard Weissenfels in *Goethe im Sturm und Drang*,³ unlike some other writers, has a very high opinion of the movement, which he designates usually by the name appearing in the title of his book. He considers the period not only from a literary point of view, but also from the standpoint of *Kulturgeschichte*, as a complement to the Enlightenment.⁴ Furthermore he distinguishes, perhaps more clearly than any of his predecessors, between the two phases of his subject, namely the aspect of *Kraftgenie* and that of *Originalgenie*.⁵ But nowhere does Weissenfels throw any light at all upon the origin of the term "Sturm und Drang."

Max Koch in his *Geschichte der Deutschen Literatur*⁶ gives us the following information:

"Sturm und Drang" lautet die Überschrift eines 1776 veröffentlichten Schauspiels von Klinger. Erst im 19. Jahrhundert ist es allgemein üblich geworden, den Namen des Stückes zur Bezeichnung der zwei Jahrzehnte vom Erscheinen der Herderschen "Fragmente" 1767 bis zum Abschluss von Schillers "Don Karlos" 1787 zu verwenden. Während der neuerungsfreudigen Literaturbewegung selbst sprach man von einer "Genieperiode." Die Bevorzugung des jetzt gebräuchlichen Namens birgt zugleich ein Urteil in sich. Wir pflegen mit dem Namen "Genie" schlechtweg nur jene Geisteskraft zu ehren, die siegreich sich durch jegliche Wirrungen durcharbeitet. Und aus der zahlreichen Schar aller der mehr oder minder grossen dichterischen und schriftstellerischen Begabungen sind doch bloss Herder, Goethe und Schiller als die vom Genius wirklich geweihten geistigen Führer der Nation hervorgegangen.

The English scholar Robertson in his *History of German Literature*⁷ uses both "Geniezeit" and "Sturm und Drang" and says:

The "Geniezeit"—the phrase "Sturm und Drang" was not employed until a later date—was in truth a period of genius (p. 307).

² Kiel, 1893.

³ 1. Band, Halle, 1894.

⁴ P. 12 ff.

⁵ P. 58.

⁶ Vogt und Koch, *Geschichte der Deutschen Literatur*, 2. Band 4. Auflage, Leipzig and Wien, 1918, p. 226.

⁷ New York, Edinburgh, and London, 1902.

Later he adds that

"Der Wirrwarr oder Sturm und Drang" is the play which gave its name to the movement (p. 326).

Richard M. Meyer,⁸ while preferring the title "Sturm und Drang"—he says the movement is so called

. . . mit sehr glücklicher Benutzung eines Klingerschen Dramentitels⁹ uses also "Genieperiode" (p. 269). Bartels,¹⁰ too, prefers "Sturm und Drang." But none of these writers add any further information on the origin of that expression and its application to the movement.

One other recent work deserves to be consulted in this connection. It is A. W. Porterfield's *An Outline of German Romanticism*.¹¹ In his chapter on "Storm and Stress" the author, writing primarily for students, gives the following unusually full information on the rise and development of the name:

The movement took its name from Klinger's drama of like name (1776), though this drama was first, and more happily, called "Der Wirrwarr," Klinger changing it to "Sturm und Drang" at the suggestion of Christoph Kaufmann, who took the idea from Lavater. The expression "Sturm und Drang" did not, however, become current until 1828, when Tieck made it so by discussion connected with his edition of Lenz's works (p. 10).

We have now considered a sufficient number of the more recent works on the subject to warrant the conclusion that the term "Sturm und Drang" as applied to the literary movement has not only come to be accepted universally as a part of the great stock of literary tradition, but that most writers consider it so familiar as to require no detailed explanation.

If we examine the earlier histories of literature, we find a situation somewhat different. Koberstein,¹² for example, is familiar with the name "Sturm und Drang," to be sure. But in his work it occurs as a rule only in the Table of Contents and Notes, most of which are later additions. In the text it

⁸ *Die Deutsche Literatur bis zum Beginn des 19. Jahrhunderts*, 5. bis 9. Tausend, Berlin, 1920.

⁹ P. 464. Cf. also Berendt and Wolff, *F. M. Klingers dramatische Jugendwerke*, 1. Band, Leipzig, 1912, p. xlvi, for a similar attitude.

¹⁰ *Geschichte der Deutschen Literatur*, Grosse Ausgabe in 3 Bänden, 1. Band, Leipzig, 1924, p. 487 ff.

¹¹ Boston, New York, Chicago, and London, 1914.

¹² *Geschichte der deutschen Nationalliteratur*, 5. umgearbeitete Auflage von Karl Bartsch, 2. Teil, Leipzig, 1873. The first edition appeared in 1827.

appears but sparsely: "Sturm und Drang," p. 154; "Sturm- und Drangzeit," p. 111; "der stürmische Drang," p. 26; and "Sturm- und Drangmänner," p. 168. On the other hand, "Genie" (p. 25 ff.), "Originalgenie" (pp. 81, 85 ff., 155-175), "Kraftmänner" (p. 84), "Geniedrang" (p. 133), "Originalköpfe," "Originalcharakter," etc., are rather more common. In Gervinus,¹³ too, "Sturm und Drang" occurs occasionally. For example, he says:

Weit der fruchtbarste und nachwirkendste unter diesen Dichtern, und der ächte Vertreter dieser Zeit ist Friedrich Maximilian Klinger, . . . von dem wir schon Hauptzüge zur Charakteristik der Periode entlehnt haben, die von seinem Schauspiel "Sturm und Drang" sogar den Namen führt (p. 659).

He speaks also of Herder's "Sturm- und Drangstil" (p. 576) and of "Sturm- und Drangsinn" (p. 655). Yet far more common are "Originalgenie" (p. 459 ff.), "Kraftgenie" (pp. 469, 643), "Krafttragödie" (p. 651), and "Genialität" (p. 654: "Müller gehört wesentlich in die Reihe der Genialitäten dieser Zeit.") It is clear, then, that for both Koberstein and Gervinus, "Sturm und Drang" is as yet by no means the standard designation.

In Vilmar,¹⁴ on the other hand, the term "Sturm und Drang" has already become quite current. To be sure, we find also "Periode der Originalgenies" (p. 384) and "Genieperiode" (p. 466), but "Sturm- und Drangperiode" (pp. 384 and 466) shows a strong tendency to become the norm. For Scherer,¹⁵ finally, "Sturm und Drang" is the fixed expression (p. 501 ff.); "Genieperiode" and "Originalgenies" he uses only incidentally as subsidiary words.

In all these earlier writers, just as in their successors of recent years, one looks in vain for an attempt at a full, satisfactory explanation of the development of the term. Found in spasmodic use as early as Koberstein (1827), it gained preference very slowly and gradually over its rivals "Genie-

¹³ *Geschichte der deutschen Dichtung*, 4. Band, 5. Auflage herausgegeben von Karl Bartsch, Leipzig, 1873. The first edition appeared in 1835-1842. Laube, too (vol. 3, 1840), uses "Sturm- und Drangperiode" but prefers "Genieperiode" with reference to Goethe.

¹⁴ *Geschichte der deutschen National-Literatur*, 22. Auflage, Marburg und Leipzig, 1886. The first edition appeared in 1845.

¹⁵ *Geschichte der deutschen Literatur*, 3. Auflage, Berlin, 1885. The first edition appeared in 1883. The work of Franz Hirsch (1883) also uses the term regularly, but did not have the influence that Scherer's work had.

periode," "Periode der Originalgenies," etc., until with Vilmar and Scherer it attained a supremacy that in succeeding years became ever more marked. Today, finally, it is recognized as a part of traditional literary nomenclature that seems to call for no elucidation.

II

If we would find a full, in fact the fullest and best available exposition of the development of the term "Sturm und Drang," the exposition on which apparently the accounts of Porterfield and others quoted above, are directly or indirectly based, and which forms the foundation for all our accepted ideas on the semasiological development of the term, we must turn obviously not to the representative writers on Storm and Stress during the past one hundred years, but rather to the monumental Grimm *Wörterbuch*, 4. Band, 1. Abteilung, 2. Hälfte (1897)—the last volume that bears traces of the hand of Rudolf Hildebrand. Here we read as follows in the article "Genie" number 11, columns 3428 ff.:

Der jetzt gangbarste Ausdruck, Sturm- und Drangperiode, der doch das Wesen der Sache nicht bezeichnet, nur eine Äusserung davon und auch diese nur nach ihrer Form, ist, was doch bemerkt sei, dem 18. Jahrhundert noch fremd und von späterer literarischer Entstehung; noch Goethe im 19. Buch von "Wahrheit und Dichtung," das von der Genieperiode handelt, macht keinen Gebrauch davon, wie ich ihn z. B. auch in Franz Horns Buch vom Jahre 1812, "Die schöne Literatur Deutschlands während des 18. Jahrhunderts," ja noch in Wolfgang Menzels Buch von 1828, "Die deutsche Literatur," vergebens suchte; aber bei Tieck im Jahre 1828 doch schon als völlig gangbar: "Wir haben jene Zeit halb vergessen . . . den neueren Kritikern und Erzählern ist fast nur der stehende Beiname der Sturm- und Drangperiode im Gedächtnis geblieben" (Schriften von Lenz, I, vii).¹⁶ Aber das 18. Jahrhundert bot den Anlass zu dem Ausdruck.

Then Hildebrand proceeds to quote from Klopstock's ode "Der Hügel und der Hain" (1767), in which the poet refers as follows to the songs of the ancient bards:¹⁷

Gestaltet mit kühnem Zug;
tausendfältig, und wahr, und heiss! ein Taumel! ein Sturm!

¹⁶ See Ludwig Tiecks *Kritische Schriften*, II, Leipzig, 1848, p. 179.

¹⁷ Kürschner, D.N.L., Klopstock, III, 139. In this passage, as usually, the *Wörterbuch* refers to an old edition. Whenever possible the present writer has used a more modern and more accessible edition.

The trend of development which is to follow is clearly foreshadowed here.

Next he cites the title of Klinger's play, changed from "Der Wirrwarr" at the insistence of Christoph Kaufmann, the charlatanic emissary of Lavater,¹⁸ who was responsible for the estrangement that took place soon after between Klinger and Goethe. Many years later, on May 26, 1814, Klinger wrote to Goethe about the incident as follows:¹⁹

Das letzte Mal, da ich Sie sah, war ich in Weimar während des ersten Sommers Ihres dortigen Aufenthalts . . . Ich schrieb damals im Drang nach Tätigkeit ein neues Schauspiel, dem der von Lavater (er ruhe sanft) zur Bekehrung der Welt abgesandte Gesandte oder Apostel mit Gewalt den Titel "Sturm und Drang" aufdrang, an dem später mancher Halbkopf sich ergötzte. Indessen versuchte dieser neue Simson, da er weder den Bart mit dem Messer schor, noch Gegorenes trank, auch an mir vergeblich sein Apostelamt. Er rächte sich dafür. Hätt' ich mich bei meiner Abreise mehr als durch Blicke des Herzens gegen Sie erklärt, ich wäre Ihnen gewiss werter als je geworden.

Hildebrand follows up the title of Klinger's play with the phrase "Sturm und Gedränge" from a letter of Lavater to Herder of 1773²⁰. This phrase, a favorite with Lavater, formed the basis of Kaufmann's, his disciple's, suggestion to Klinger, it is claimed, and has, therefore, considerable importance. Since it is not used with reference to any literary movement, however, but is merely a general expression of personal application, it can be regarded only as having furnished the germ for the group of ideas that later crystallized around "Sturm und Drang" as the name for a literary tendency.

A quotation from a letter of Klinger to Schleiermacher, dated Leipzig, April 3, 1777, follows in Hildebrand's account:²¹

Ich lebe so hin, bald in Drang und Sturm, bald im gelinden Säuseln.

¹⁸ For the facts see Rieger, *Klinger in der Sturm- und Drangperiode*, Darmstadt, 1880, p. 163. On Kaufmann, who owes his place in literature solely to his suggestion to Klinger, see Düntzer, *Christoph Kaufmann, der Kraftapostel der Geniezeit*, in Raumer's *Historisches Taschenbuch*, 1859 (also the same author's separate monograph, Leipzig, 1882). Also Sauer in D.N.L., 79, introduction, p. 19 ff. He is parodied as "Gottesspürhund" in Maler Müller's *Faust* (*Literaturdenkmale*, III, 45 ff.). Lavater, however, always thought highly of him; see Lavater's letter to Herder of June 26, 1779 (Düntzer and Herder, *Aus Herders Nachlass*, II, Frankfurt, 1856).

¹⁹ Rieger, *op. cit.*, p. 173. See also Hettner, *op. cit.*, p. 263.

²⁰ *Aus Herders Nachlass*, II, 76.

²¹ Rieger, *op. cit.*, p. 407.

Evidently the phrase has made a deep impression on Klinger; it has become part of his vocabulary. Indeed, Hildebrand might well have quoted the following somewhat similar expression from Klinger's correspondence, too. On March 17, 1777, even earlier than the previously quoted letter, he writes also to Schleiermacher:²²

Meine Situation ist drang und leidensvoll.

Hildebrand now turns to Maler Müller, who in his *Faust* (1778) has the devil Atoti say of the "Genies:"²³

. . . immer schreiend von Kraft und Stärke, Sturm und Drang.

Then Hildebrand quotes the expressions "Sturm und Drang" and "Drang und Sturm" from the *Geschichte eines Genies* (1780), both used in a purely personal connection, and the following lines from Bürger's sonnet *An das Herz* (1792):²⁴

Lange schon in manchem Sturm und Drange
Wandeln meine Füße durch die Welt.

In all these passages, except perhaps that from Maler Müller, it will be noted, the term is used merely in a personal sense with reference to the feelings of an individual. The same is true of the following passage which Hildebrand quotes from a letter by Goethe to Schiller of May 22, 1803. Goethe, referring to his impressions on looking over an old manuscript of the *Farbenlehre*, says:²⁵

die Mühe, der Fleiss, das Schleppen und Schleifen und dann wieder der Sturm und Drang, das alles macht in den Papieren und Akten eine recht interessante Ansicht.

The next quotation, from Kästner (1793), on the other hand, clearly reveals a turn of phrase quite similar to the modern usage. Kästner is speaking of certain political writers of the day, who, he says, remind him of:²⁶

. . . die Genie-, Kraft-, Drang-, und Sturmänner, die Deutschland vor einigen Jahren aus dem Reiche der Ästhetik weggelacht hat.

Finally, with references to the word "Geniedrang" used by Friedrich Schulz in 1782, to the Goethean expression

²² Ibid.

²³ Literaturdenkmale, III, 19-20.

²⁴ D.N.L., Bürger, p. 361.

²⁵ Weimar ed., IV. Abteilung, 16. Band, p. 232.

²⁶ Kästner, *Werke*, III, Berlin, 1841, p. 176.

"durchstürmen, durchdrängen"²⁷ describing Klinger, and to the words "Wurf- und Schwungmänner" and "Schwung- und Kraftmänner,"²⁸ Hildebrand closes his discussion.

The *Wörterbuch* article on "Drang," 2. Band, column 1334, supplements our material with the two following passages from Jean Paul, both again of merely personal applicability.

Siebenkäs (1796):²⁹ Er war bloss in Bayreuth dem freundschaftlichen Sturm und Drang seines Leibgebers mit seinem sonst wahren Herzen gegen einen Freund erlegen.

Titan (1800):³⁰ Unter dem Essen sprach der Lektor mit wahren Geschmack über die liebliche Gegend, aber mit wenig Sturm und Drang.

Thus far the Grimm *Wörterbuch*. The great authority and weight that it carries in this point, as in others, make the following detailed discussion seem worth while.

In calling "Sturm- und Drangperiode" the most current (*gangbarste*) designation for the period, Hildebrand, writing in the last decade of the nineteenth century, is correct, as we have seen. His objection to it, however, as describing not the heart of the movement but only a manifestation of it, is not universally shared today. Both Koch and Meyer, for example, seem to feel that it is a rather comprehensive and happy descriptive title.

This brings us to the important statement, strongly emphasized by Hildebrand (*was doch bemerkt sei*) that "Sturm und Drang" as applied to the movement is a name unknown (*fremd*) to the eighteenth century, that it is of late literary origin, that hence it is found neither in Goethe, nor in Horn (1812), nor in Menzel (1828), but that Tieck used it in 1828 in his Introduction to the edition of Lenz.

The thoughtful reader will notice, however, that Hildebrand is here not quite sure of his ground, and in a sense guilty of a contradiction. For while he denies the existence of the term (as applied to the movement) in the eighteenth century, and finds no occurrences prior to Tieck, he admits

²⁷ "Dichtung und Wahrheit", 3. Teil, 14. Buch. Weimar ed., 24. Band, p. 190. This passage, as well as others from *Dichtung und Wahrheit*, will be further discussed below.

²⁸ For "Wurf" see below on Nicolai. For "Schwung" see also Maler Müller, *Faust* (Literaturdenkmale, III, p. 20), where Atoti, speaking of the Storm and Stress poets, says: "zu beweisen, dass auch Schwung in ihren Armen sitzt."

²⁹ D.N.L., Jean Paul, III, pp. 182-183.

³⁰ Op. cit., IV, p. 20.

that for Tieck the term is altogether current (*völlig gangbar*). In fact, Tieck calls it "der stehende Beiname." Then too Maler Müller's expression of 1778 and Kästner's "Drang- und Sturmmänner" of 1793 are evidence of at least an early potential development. Moreover, Koberstein's familiarity with the phrase in 1827 has been noted. These considerations have prompted the writer to make a careful re-examination of the sources with a view to finding new evidence and drawing more convincing conclusions.

The following results have been obtained:

1. Klinger in his early dramas, as well as in his letters quoted above, shows a preference for the words "Sturm" and "Drang." The opening speech of Wild in *Sturm und Drang* is characteristic:³¹

Heyda! nun einmal in Tumult und Lermen, dass die Sinnen herumfahren wie Dach-Fahnen beym Sturm. Das wilde Geräusch hat mir schon so viel Wohlseyn entgegen gebrüllt, dass mir's wirklich ein wenig anfängt besser zu werden. So viel Hundert Meilen gereiset um dich in vergessenden Lermen zu bringen—Tolles Herz! du sollst mirs danken! Ha! tobe und spanne dich dann aus, labe dich im Wirrwarr.

In another place a character of Klinger remarks similarly:³²

Ich fahr' herum wie ein Wetterhahn auf dem Thurm beym Sturm.

Wild also says in *Sturm und Drang* (Act 2, Sc. 1, p. 284):

So Welt auf, Welt ab, in zauberhafter, *drängender* [our italics] Phantasie.

The captain says (Act 3, Sc. 4, p. 310):

Glaub mir, wann du niederfällst, pfeif ich dir ein Sterbelied, das meine Matrosen pfeifen, wenn der Sturm am tollsten wütet.

In Act 4, Sc. 4 (p. 325) and Act 4, Sc. 5 (p. 329) there is also talk of "Sturm," and in Act 4, Sc. 6 (p. 332) Blasius says:

Lass denn den Sturm hinfahren, die Winde heulen über mir.

And in the last scene of the play Berkley remarks (p. 353):

Nur diese Gnade, lieber Himmel! dass ich dieses Kind vergesse! aus diesem verworrenen Drang komme!

³¹ Berendt and Wolff, op. cit., vol. II, p. 265.

³² Quoted by Erich Schmidt, *Lenz und Klinger*, pp. 98-99.

Finally in *Die Zwillinge* (written before *Sturm und Drang*) old Guelfo says:³³

Grimaldi ist ein düsterer Mensch, der Nachts im Feld läuft, bey Sturm und Wind.

On the strength of this preference we may well doubt whether Klinger was correct in his letter to Goethe of 1814, quoted above, when he says that Kaufmann forced the title upon him (*mit Gewalt . . . aufdrang*). Klinger's mind was well prepared to accept it. His tone in the Goethe letter is apologetic.

2. When *Sturm und Drang* was presented without much success at Frankfurt late in the spring of 1777, Klinger's friend, H. L. Wagner, wrote rather angrily in the *Briefe die Seylersche Schauspielergesellschaft . . . betreffend*:³⁴

Wer fühlt oder auch nur ahnt, was Sturm und Drang seyn mag, für den ist das Drama geschrieben; wessen Nerven aber zu abgespannt, zu erschlaft sind, vielleicht von jeher keinen rechten Ton gehabt haben, wer die drey Worte anstaunt, als wären sie chinesisches oder malarbarisches, der hat hier nichts zu erwarten.

3. In a long review in the *Allgemeine Deutsche Bibliothek* of 1777 entitled "Von der Lehre der Gebets- und Glaubenskraft, wie auch von Schwärmerei und Enthusiasmus,"³⁵ written probably by Nicolai and Petersen, we read with regard to certain polemical writings of Lavater and his friend Pfenniger:

Diese schleichenden Wendungen gleichen den listigen Absprüngen eines gejagten Wildes, das seine Schwäche fühlt und seine Jäger von der Spur bringen will. Andere Schriftsteller dieser Partei hingegen, [sc. Herder, Goethe and his circle] wilden Hauern gleich, die sich dem Spiesse des Jägers entgegenstellen und ihn selbst zu Boden zu stürzen suchen, voll Drang und Sturm, eine neue Revolution zu erregen, verwarfen ohne Bedenken alle gelassene Vernunft und redeten geradezu der Schwärmerei das Wort.

Other pertinent passages from Nicolai, especially from the Introduction to his *Kleyner, feyner Almanach* (1777), will be quoted later.

4. In his dedication of *Fausts Leben* to von Gemmingen, Maler Müller says:³⁶

Fühlten wir doch oft süßsen Drang, Theuerster, zum schaffen.

³³ Berendt and Wolff, op. cit., I, p. 272.

³⁴ Frankfurt a. M., 1777, Eichenberg'sche Erben, p. 131.

³⁵ Vol. 30, No. 2, pp. 311-400. Quotation on p. 359 ff.

³⁶ Literaturdenkmale, III, 5.

And again (p. 6):

Giengs dann immer voran im Sturm, an Wasser, und Wald, Steg und Hecken jetzt vorüber, dem Flug erhitzter Jugend-Phantasie nach.

5. Lichtenberg, like Nicolai an avowed enemy of Storm and Stress, has the following passages. The first is from the essay *Über Physiognomik* (1778):³⁷

Gewiss hat die Zollfreiheit unserer Gedanken und der geheimsten Regungen unsers Herzens bei uns nie auf schwächern Füßen gestanden als jetzt, wenn man aus der Emsigkeit, der Menge und dem Muth der Helden und Heldinnen, die sich wider sie auflehnen, auf ihren baldigen Umsturz schliessen darf. Man dringt von allen Seiten auf die zukommlichsten Werke ihrer Befestigung, und wo man sonst geheimen Vorrath vermutet, mit einer Hitze ein, die mehr einem gothisch-vandalischen Sturm als einer überdachten Belagerung ähnlich sieht, und viele behaupten, eine förmliche Übergabe könne schlechterdings nicht mehr weit sein. Es gibt aber auch eine Menge minder sanguinischer Menschen, die dafür halten, die Sache liege über ihrem geheimsten Schatz noch jetzt so unzukommlich sicher, als vor Jahrtausenden, und lächle über die anwachsenden babylonischen Werke ihrer stolzen Stürmer, überzeugt, dass sich, lange vor ihrer Vollendung, die Sprachen ihrer Arbeiter verwirren, und Meister und Gesellen aus einander gehen werden. Die Sache, wovon hier die Rede ist, ist die Physiognomik.

The second passage is from the essay *Von ein paar alten Dramen* (1779). Discussing Storm and Stress in its relation to the older periods, Lichtenberg speaks of two comedies by the seventeenth-century writer Rudolph von Bellinkhaus and says:³⁸

[Sie] zeigen mehr als alles, was ich gelesen habe, was in diesem Falle Genie ohne Umgang mit der Welt und ohne Cultur, bloss durch Drang allein vermag.

The third passage is from the Aphorisms. Ridiculing Lavater's experiments in physiognomy, Lichtenberg remarks (F 734):³⁹

Der Unterschied ist blos, Schwedenborg sah Doktor Luthern im Vorzimmer und Lavater Möglichkeit mit Existenz-Drang auf einer Nase.

Many other passages from Lichtenberg will follow below.

6. In a notice of a new Werther imitation, von Knigge,

³⁷ *G. C. Lichtenbergs Vermischte Schriften*, 8 Bände, Göttingen, 1844-1847, vol. 4, p. 18. Quoted also in Sauer, D.N.L. 79, p. 56.

³⁸ *Schriften*, vol. 4, p. 127.

³⁹ *Literaturdenkmale*, 3. Folge, vol. 16, p. 255.

writing in the *Allgemeine Deutsche Bibliothek* (1784) uses the epithet "Sturm- und Drang-Messware."⁴⁰

7. In Iffland's little book *Blick in die Schweiz* (1793), which records the author's impressions gained on a short trip to Switzerland the year before, we read a description of the principality of Donauessingen. The theatre, of course, interests Iffland particularly, and he writes:⁴¹

Das Schauspielhaus ist allerliebste, weder zu gross noch zu klein. Ich freue mich, dass die Fürstin die Sturm- und Drangstücke nicht geben lässt, ohnerachtet der Raum des Theaters es nicht verbietet.

Another passage from a different work of Iffland will be quoted later.

8. In his lectures on "Geschichte der romantischen Literatur" delivered at Berlin during the winter of 1803-1804, August Wilhelm Schlegel says:⁴²

Der fast vergessene Faust von Mahler Müller ist ebenfalls nur Fragment. Es sind, wie in allem was von diesem Manne herrührt, herrliche Anlagen darin, die nur durch die üblen Manieren der damaligen Sturm- und Drang-Periode entstellt werden.

9. In volume XI of his *Geschichte der Poesie und Beredsamkeit*, published in 1819 under the subtitle *Dritte Abteilung, Geschichte der schönen Wissenschaften*,⁴³ the Göttingen professor Friedrich Bouterwek has the following passage on Storm and Stress:

Unter den Seltsamkeiten, die aus den Werken einiger Dichter dieser Periode in die Denkart des Zeitalters übergingen, und aus dieser wieder auf die Litteratur zurückwirkten, müssen zwei Geisteskrankheiten genannt werden, die vorher in dieser Himmelsgegend unbekannt waren, und in wenigen Jahren epidemisch wurden: die Genieaffectation und die Empfinderei. Das Wort Genie, das schon länger in der deutschen Sprache sich festgesetzt hatte, wurde jetzt die Lösung aller Derer, die etwas Grosses zu leisten glaubten, wenn sie dem Neuen und Unerhörten nachjagten. Schwachköpfe, die kaum Talent genug zu einer geschickten Nachahmung hatten, hielten sich für Genies, weil sie voll stolzen Vertrauens auf ein wenig Phantasie, das ihnen die Natur verliehen hatte,

⁴⁰ Vol. 60, No. 2, p. 431.

⁴¹ *Blick in die Schweiz*. Von August Wilhelm Iffland. Leipzig, bey Georg Joachim Göschen, 1793, p. 160.

⁴² *Literaturdenkmale*, vol. 19, pp. 154-155.

⁴³ Göttingen, bei Johann Friedrich Röwer, 1819. The passage quoted is from *Fünftes Buch der Geschichte der deutschen Poesie und Beredsamkeit*, in volume XI of the general series, pp. 364-365. Acknowledgment is made to Professor B. J. Vos for calling attention to this passage and for letting the writer consult his copy of the volume.

dem gesunden Verstande Hohn sprachen. Diese Genieaffen wollten von keiner Regel etwas wissen. Gelehrsamkeit war in ihren Augen nicht viel mehr als eine unnütze Last des Geistes. Die Natur sollte ihre grosse Lehrerin seyn; und diese glaubten sie hinlänglich verstanden zu haben, wenn sie mit stürmender Anmassung den Drang ihrer erkünstelten Gefühle aussprachen. Sturm- und Drang- Genies wurden sie desswegen betitelt. Mit dem leidenschaftlichen Ungestüme und der raffinierten Wildheit, an denen man diese Art von Genies erkannte, vereinigte die Mode aber auch eine weinerliche Empfindsamkeit. Nicht nur die Litteratur wurde von dieser Thorheit angesteckt; auch im gemeinen Leben machten Gecken, die für Genies gelten wollten, eccentricische Sprünge, die man Geniestreiche nannte. Einige, die in Göthe's Werther sich berauscht hatten, sollen sich zuletzt auch erschossen haben, um zu endigen wie Werther. Andre, die nicht so geneigt waren, Hand an sich selbst zu legen, hielten sich schadlos an Seufzern und Thränen, im Geschmacke des Romans Siegwart von dem sanften Dichter Martin Miller; sie weinten, wenn sie eine Blume abpflückten, und klagten ihre Leiden dem Monde. Unter diesen Überspannungen kam indessen auch manche merkwürdige, vorher nicht beachtete Seite des menschlichen Herzens zum Vorschein, und wurde ein neuer Stoff für die Poesie. Erst durch die kantische Philosophie wurde die Art von Genieaffectation und Empfindelei, die um das Jahr 1770 anfang, ganz aus der Mode gebracht.

The passage is of particular interest because of the author's apparent attempt to explain the term "Sturm und Drang" not from Klinger's play, but on the basis of characteristics of the movement itself. The use of the term by Bouterwek is important because his work was widely read and exercised considerable influence.

These passages, it is hoped, will serve to throw some light upon the early use of the term. Perhaps they will also demonstrate that Klinger's mind was well prepared to accept the title *Sturm und Drang* when Kaufmann suggested it to him in 1776; that as early as 1777 the term was felt not only by such friends of the movement as Wagner (and undoubtedly others too—by Maler Müller in 1778), but also by such enemies as Nicolai, as being a slogan; that contrary to Hildebrand's belief and contrary to the notion generally prevalent today, the expression was used as early as 1784, was employed in 1793 without comment and as a generally intelligible phrase by one of the outstanding theatrical men of the day, was taken for granted in 1803 by a prominent student of literature in lecturing to the general public at Berlin, and appears in an important literary work in 1819.

In view of these data, we are inclined to believe that the phrase was perfectly well known from the very outset. The fact that it was not more widely used in literature during the early period we would explain by the following assumption. The prevailing attitude toward Storm and Stress from 1780 until well into the nineteenth century was a satirical one, as we shall see. Now since the designation "Sturm und Drang" conveys no necessarily satirical or derogatory impression, it was often avoided in favor of such derisive terms as "Periode der Originalgenies" or "Kraftgenies," or the like. Used spasmodically by Knigge, Kästner, Iffland, Schlegel, Bouterwek, Koberstein, Tieck, Gervinus, and others, and orally perhaps much more often (cf. Tieck's "der stehende Beiname"), it gradually made headway and, with a decreasingly depreciatory and more detached attitude toward the movement, finally became standard.

One more point in Hildebrand's *Wörterbuch* article deserves to be discussed. It is his reference to the fact that in Goethe, just as in Horn and Menzel, the name "Sturm und Drang" does not yet appear.

Goethe very early in life shows the influence of the so-called *Geniekultus*. Weissenfels⁴⁴ sees in Goethe, even during the Leipzig period, signs of both phases of Storm and Stress, namely "Kraftgenie" and "Originalgenie." Indeed, the following passage to his sister Cornelia in a letter from Leipzig of May 11, 1767, reveals this clearly:⁴⁵

Man lasse doch mich gehen; habe ich Genie, so werde ich Poete werden, und wenn mich kein Mensch verbessert; habe ich keins, so helfen alle Critiken nichts.

With *Götz von Berlichingen* of course he became the protagonist of the movement and with *Werther* he fortified his leadership. But he had outlived the period soon after his settlement in Weimar, as more than one of his satirical skits at the expense of his erstwhile companions shows. The following passages from *Dichtung und Wahrheit*, finally, tell us how far the aging Goethe had left Storm and Stress behind.

3. Teil, 11. Buch:⁴⁶

Alles dieses und manches andere, recht und töricht, wahr und halb wahr, das auf uns einwirkte, trug noch mehr bei, die Be-

⁴⁴ Op. cit., p. 58.

⁴⁵ Weimar ed., IV. Abteilung, 1. Band, p. 89.

⁴⁶ Weimar ed. 28, pp. 67-68.

griffe zu verwirren; wir trieben uns auf mancherlei Abwegen und Umwegen herum, und so ward von vielen Seiten auch jene deutsche literarische Revolution vorbereitet, von der wir Zeugen waren, und wozu wir, bewusst und unbewusst, willig oder unwillig, unaufhaltsam mitwirkten.

3. Teil, 12. Buch:⁴⁷

. . . jene berühmte, berufene und verrufene Literarepoche, in welcher eine Masse junger genialer Männer mit aller Mutigkeit und aller Anmassung, wie sie nur einer solchen Jahreszeit eigen sein mag, hervorbrachen, durch Anwendung ihrer Kräfte manche Freude, manches Gute, durch den Missbrauch derselben manchen Verdruss und manches Übel stifteten.

3. Teil, 14. Buch:⁴⁸ Speaking of Klinger's inability to come immediately

. . . zu einer frohen und freudigen Ausbildung,

Goethe continues:

. . . vielmehr musste er sich durchstürmen, durchdrängen.

4. Teil, 18. Buch:⁴⁹

. . . die eigentliche geniale Epoche unserer Poesie.

4. Teil, 19. Buch:⁵⁰

Damals manifestierte sich [das Genie] nur, indem es die vorhandenen Gesetze überschritt, die eingeführten Regeln umwarf und sich für grenzenlos erklärte. Daher war es leicht genialisch zu sein, und natürlicher, als dass der Missbrauch in Wort und Tat alle geregelten Menschen aufrief, sich einem solchen Unwesen zu widersetzen.

4. Teil, 19. Buch:⁵¹

Und so fand ich mich fast mehr gehindert mich zu entwickeln und zu äussern, durch falsche Mit- und Einwirkung der Sinnesverwandten, als durch den Widerstand der Entgegengesinnten. Worte, Beiworte, Phrasen zu Ungunsten der höchsten Geistesgaben verbreiteten sich unter der geistlos nachsprechenden Menge dergestalt, dass man sie noch jetzt im gemeinen Leben hie und da von Ungebildeten vernimmt, ja dass sie sogar in die Wörterbücher eindringen, und das Wort Genie eine solche Missdeutung erlitt, aus der man die Notwendigkeit ableiten wollte, es gänzlich aus der deutschen Sprache zu verbannen. Und so hätten sich

⁴⁷ Ibid., p. 117.

⁴⁸ Ibid., pp. 254-255. Just before this Goethe says of Klinger (p. 253): "Sein Betragen war weder zuvorkommend noch abstossend, und, wenn es nicht innerlich stürmte, gemässigt."

⁴⁹ Op. cit., 29, p. 83.

⁵⁰ Ibid., pp. 146-147.

⁵¹ Ibid., p. 147.

die Deutschen, bei denen überhaupt das Gemeine weit mehr überhand zu nehmen Gelegenheit findet als bei anderen Nationen, um die schönste Blüte der Sprache, um das nur scheinbar fremde, aber allen Völkern gleich angehörige Wort vielleicht gebracht, wenn nicht der durch eine tiefere Philosophie wieder neugegründete Sinn fürs Höchste und Beste, sich wieder glücklich herstellt hätte.

While these passages confirm Hildebrand's statements, it should be remembered that the phrase "durchstürmen, durchdrängen" is undoubtedly a pun on "Sturm und Drang," and that the expression "Sturm und Drang" is used in a general meaning of personal application in the letter to Schiller of 1803, quoted above. It is our impression that Goethe avoids the term purposely. In his case this may well be due to an aversion to it as applied to the movement. This would serve also to explain in part the apologetic tone of Klinger when he writes to Goethe in 1814 that Kaufmann "forced the title 'Sturm und Drang' upon him." But Zeitler in his recent *Goethe-Handbuch*⁵² has no article on either "Sturm und Drang" or "Genieperiode," but merely a short pertinent entry on "Genie." E. von der Hellen, on the other hand, in the *Registerband* of the *Cotta Jubiläumsausgabe*, gives references under the caption "Sturm und Drang."

III

Klinger early became the butt of ridicule because of his extravagant plays and extreme views. Soon after the appearance of his drama *Das leidende Weib* in 1775, the parody *Die frohe Frau* appeared.⁵³ A reviewer of the squib heaps insult upon injury by saying of Klinger:⁵⁴

Er studirt zu Giessen, heisst Klinger. Er nimmt sich sehr viel heraus. Er ist erst ein halbes Jahr von der Frankfurter Schule.

In a letter of Nicolai to Höpfner of April, 1776, we read:⁵⁵

Klinger scheint mir ein sehr mittelmässiger Bursche zu sein, der nur die Manier aufgeschnappt und selbst nicht viel in sich hat.

⁵² Stuttgart, 1917.

⁵³ Reprinted in vol. I of Berendt and Wolff, op. cit., p. 332 ff.

⁵⁴ Braun, *Goethe im Urteil seiner Zeitgenossen* (1773-1786), Berlin, 1883, p. 342.

⁵⁵ M. Sommerfeld, *Friedrich Nicolai und der Sturm und Drang*, Halle, 1921, p. 279. In the same way Nicolai ridicules Lenz in *Die Freuden des jungen Werthers* (1775) as "das leichte, luftige Kerlehen." See Sommerfeld, op. cit., p. 275.

On July 22, 1776, Nicolai gets from his friend Petersen a lurid description of young Klinger, who is said to use opium and overheat his room for the sake of firing his imagination.⁵⁶

Klinger himself lost no time in turning away from his Storm and Stress mood. As early as 1780 the satirical *Plimplamplasko der hohe Geist (heut Genie)* appeared, usually ascribed to Klinger alone,⁵⁷ but described recently by F. Löwenthal⁵⁸ as being chiefly the work of Klinger and secondarily that of Lavater and Sarasin. In this skit, Plimplamplasko, the "Genie," temporarily dethrones Puro Senso (common sense) and rules with "hoch und gross Geisterey," establishing "die neu Kraftgesaze, die gestimmt thäten seyn nach dem Ideali." But soon he is ousted and Puro Senso takes up the reins again. In a review in the *Allgemeine Deutsche Bibliothek*⁵⁹ Musaeus describes the work as:

. . . die Spottschrift gegen die schwindelköpfigen Dunse jenes Jahrzehnts, die sogenannten Genies oder Kraftmänner.

Primarily it is directed against Kaufmann. In 1785, in the preface to his *Theater*, published at Riga, Klinger has drifted so far away from his old moorings that he is able to say of the characters in his early plays:⁶⁰

Freylich sind es individuelle Gemähle einer jugendlichen Phantasie, eines nach Thätigkeit und Bestimmung strebenden Geistes, die in das Reich der Träume gehören, mit dem sie so nah verwandt zu seyn scheinen. Wer aber gar kein Licht in diesen Explosionen des jugendlichen Geists und Unmuths sieht, ist nie in dem Fall gewesen, etwas davon in sich selbst zu fühlen. Ich kann heute so gut darüber lachen, als einer; aber so viel ist wahr, dass jeder junge Mann die Welt, mehr oder weniger, als Dichter und Träumer ansieht.

In a letter to his friend Kayser, dated April, 1785, he also looks upon his early works as being youthful dreams.⁶¹ In an aphorism, finally, he speaks of "Genieverschneider" and calls the literary output of his younger days

. . . die so kühn-genialischen Produkte der Dichtkunst.⁶²

⁵⁶ Sommerfeld, op. cit., p. 276.

⁵⁷ See Goedeke *Grundriss*; also L. Hirschberg, *Der Taschengoedeke*, Berlin and Frankfurt, 1924.

⁵⁸ *Beiträge zur Entstehung und Würdigung der Satire Plimplamplasko*, Euphorion, XXII, 2 (1919), pp. 287 ff. Erich Schmidt (*Lenz und Klinger*, Berlin, 1878, p. 102) believed it to be the joint work of Klinger, Lavater, Sarasin, and Pfeffel.

⁵⁹ Vol. 51, No. 1, p. 299.

⁶⁰ Berendt and Wolff, op. cit., III, 349-350.

⁶¹ *Ibid.*, II, 428.

⁶² E. Schmidt, op. cit., 105. Cf. also Klinger's letter of 1814 to Goethe, quoted above.

The foregoing quotations indicate how soon Storm and Stress had spent itself, and they suggest that 1787, the date often given as marking the end of the movement, is too late. As a living force it hardly survived the year 1782. Many other passages could be quoted to substantiate this fact. As early as April 23, 1776, Nicolai predicts to Höpfner:⁶³

Wie die Bürschchen schwatzen, bedeutet nicht viel. Das wilde Wesen wird in vier oder fünf Jahren verbraucht sein und dann wird man ein paar Tropfen Geist, und im Tiegel ein grosses caput mortuum treffen. Ich habe schon mehr dergleichen Revolutionen erlebt. Man muss die Knaben nur gehen lassen und nicht sehr auf sie Acht geben, denn ihre ganze Absicht ist, Lärm zu machen.

In the same derogatory vein Nicolai writes to Johannes von Müller on July 12, 1776. Yet he confesses here that he expects a beneficent influence from the movement.⁶⁴

Man wird das Abenteuerliche, das sie [sc. die Bewegung] einführen will, bald überdrüssig werden, aber von dem Kräftigen wird etwas zurückbleiben.

Two years later, in 1778, the writer, speaking of the Storm and Stress collection of verse *Rheinischer Most, Erster Herbst 1775*, remarks:⁶⁵

Die Vergleichung der meisten Gedichte mit einem gärenden Most ist nicht übel. Aber wie muss es kommen, dass es bei dem ersten Herbst geblieben ist? Ist der Wein am Rhein seit 1775 nicht geraten? Haben die Köpfe, welche die Mittagssonne nicht heiss genug finden konnten, um recht durchglüt zu werden, und die durch Lobeserhebungen ihrer Klienten noch dazu so fleissig gedüngt worden sind, dennoch seitdem nichts als Heerlinge getragen?

Likewise in 1778 Eberhard, reviewing Bürger's *Herzensausguss über Volkspoesie*, writes:⁶⁶

Anpreisung der Volkspoesie in überspannter und beinahe liederlicher Schreibart. So etwas hiess im Jahre 1776 Genie und im Jahre 1778 ist es die Welt schon überdrüssig.

IV

We have quoted the passage from the nineteenth book of *Dichtung und Wahrheit* in which Goethe tells how Storm and

⁶³ Sommerfeld, op. cit., p. 281.

⁶⁴ Ibid.

⁶⁵ *Allgemeine Deutsche Bibliothek*, Anhang z. 25./36. Bd., p. 754.

⁶⁶ Ibid., p. 2299.

Stress actually endangered the future existence of the word "Genie" in the German language. Max Koch says very aptly on this point:⁶⁷

Herder hat das Wort Genie geradezu mit "Original" und "Erfinder" erläutert und von Kant wurde die Ersetzung des Fremdwortes durch den deutschen Ausdruck "eigentümlicher Geist" gefordert. Ja bereits Lessing hat, freilich ohne das Schlagwort Genie zu gebrauchen, doch ganz im Sinne der Geniezeit gesprochen, wenn in seinen Versen über die Regeln der Poesie und Tonkunst dem "Mittelgeist" gegenübersteht
 ein Geist, den die Natur zum Mustergeist beschloss,
 ist, was er ist, durch sich; wird ohne Regeln gross.

Die Unabhängigkeit von den Regeln war ja gerade das Entscheidende. Die Notwendigkeit des Genies hatte man fast immer betont. Aber während Gellert noch ausdrücklich erklärt hatte, das Genie bedürfe der Regeln und Gelehrsamkeit, wird jetzt die Alleinherrschaft des Genies und die Entbehrlichkeit, ja Schädlichkeit aller Regeln, auch der von Lessing noch festgehaltenen, mit Heftigkeit noch verkündet. Wir, "die von Jugend auf alles geschnürt und geziert an uns fühlen und an anderen sehen," eifert der junge Goethe, "stossen uns an Shakespeares Planlosigkeit und Charaktere. Und ich rufe Natur! Natur! nichts so Natur als Shakespeares Menschen!" Campe wollte noch 1819 "Genie" einfach mit "Natur" übersetzen. Der ältere Goethe hat beim Rückblick den Missbrauch des Ausdrucks in Wort und Tat gerügt. Das Genie, meinte er, habe sich in den siebziger Jahren für grenzenlos erklärt, alle vorhandenen Gesetze überschritten und alle eingeführten Regeln umgeworfen. "Wenn einer zu Fusse, ohne recht zu wissen, warum und wohin, in die Welt lief, so hiess dies eine Geniereise, und wenn einer etwas Verkehrtes ohne Zweck und Nutzen unternahm, ein Geniestreich."

For the semasiological development of the word "Genie" in this period the reader is referred to the lengthy, excellent article by Hildebrand in the Grimm *Wörterbuch*. In this connection it is also interesting to study the origin and development of the terms "Kraftgeist" (first recommended by Campe as a pure German substitute for "Genie"), "Kraftgenie," "kraftgenialisch," "Kraftmann," "Originalgenie," and "Originalität."⁶⁸ This too can best be done with the aid of the *Wörterbuch*. The Storm and Stress theory of genius as an active force in man with which he is supernaturally en-

⁶⁷ Op. cit., II, 228.

⁶⁸ The idea of originality and original genius in literature, altho previously present in German literature, came to be a live issue with the translation of Young's *Conjectures on Original Composition* into German in 1760. For a discussion of the influence exercised by this work on the *Literaturbriefe* (Nicolai, Mendelssohn, etc.), on Gerstenberg and the *Schleswigsche Literaturbriefe*, on Lessing and the *Hamburgische Dramaturgie*, on Hamann and on Herder, see Kind, *Edward Young in Germany*, New York (Columbia University Press), 1906, p. 19 ff.

dowed was evolved by Hamann, Herder, and especially Lavater in Part IV of his *Physiognomische Fragmente*.⁶⁹ Lavater's idea of "Natur" and "Original" (in terms of the Bible) is disclosed by the following passages. The first appears in a letter to Deinet of July 11, 1773:⁷⁰

Die Bibel ist nur Kommentar über die Natur, die Natur ist der Text, oder vielmehr die Bibel nur Gemälde, die Natur das Original.

The second is from *Brüderliche Schreiben an verschiedene Jünglinge* of 1782:⁷¹

Die Natur ist immer Text, die Bibel immer Kommentar der Natur.

With regard to the emphasis of Storm and Stress upon nature, Iffland once exclaims:⁷²

Natur!—ich wünschte, dass der arge Missbrauch dieses Wortes aufgehoben seyn möchte.

The original, favorable connotation of "Genie," "Original," and the like never became extinct, of course, even during the height of Storm and Stress. Thus in the *Fragmente* Herder uses "Originalköpfe" in the favorable sense.⁷³ On August 21, 1770, the Königsberg students from Courland and Esthonia dedicated to Kant an ode written by "L . . . aus Liefland," that is the poet Lenz. It contains the lines:⁷⁴

Ihr Söhne Frankreichs! schmäht denn unser Norden,
Fragt, ob Genies je hier erzeugt worden:
Wenn Kant noch lebt, werdet ihr diese Fragen
Nicht wieder wagen.

This is an interesting use of the word "Genie" by one who was soon to become an example of its other connotation. Similarly C. H. Schmid, reviewing *Götz von Berlichingen* in Wieland's *Teutscher Merkur* (1773), says:⁷⁵

Uns war dies das sicherste Kriterium des Genies, dass der unbekannte Verfasser uns in einer so fortdauernden Täuschung, und in einem so ununterbrochenen Genusse erhalten hatte.

⁶⁹ Cf. Janentzky, *J. C. Lavaters Sturm und Drang im Zusammenhang seines religiösen Bewusstseins*, Halle, 1916. Cf. also Nicolai's conception of "Genie" as described by Sommerfeld, *op. cit.*, p. 34 ff. For Nicolai's ideas on "Originalität" see Sommerfeld, p. 37 ff.

⁷⁰ Quoted by Janentzky, *op. cit.*, p. 75.

⁷¹ Quoted by Janentzky, p. 76.

⁷² A. W. Iffland, *Fragmente über Menschendarstellung auf den deutschen Bühnen*, Erste Sammlung, Gotha, 1785, p. 31.

⁷³ Suphan ed., 2, 116. Cf. also note 68 above on Young.

⁷⁴ E. Schmidt, *op. cit.*, pp. 4-5.

⁷⁵ III, 267 ff.

Thus too in *Schirachs Magazin der deutschen Kritik* (1774) Goethe is called "ein Originaldramatiker,"⁷⁶ and in 1776 the same periodical speaks of the "Originalgeist eines Goethe."⁷⁷ In the *Deutsches Museum* of 1776, finally, we read of hohe Urgenien, die ganzen Nationen den Weg weisen sollen.⁷⁸

References to "Genie," "Original," and the like in the Storm and Stress connotation multiply as the movement gains ground and for a while tend to stifle the true meanings of these words altogether. Even in 1755 Nicolai expresses himself on originality in his *Briefe über den itzigen Zustand der schönen Wissenschaften in Deutschland*:⁷⁹

Deutschland hat wirkliche Originalköpfe; aber es sind derselben so wenige, dass man bei der allgemeinen Wut nachzuahmen unsern mittelmässigen Köpfen wirklich wünschen möchte, dass sie besser nachahmen lernten.

As early as the *Fragmente* Herder says, in opposition to the unworthy imitators of Young:⁸⁰

Endlich wird man den Toren am besten die Originalsucht ausreden können, wenn man mit der grossen Stimme des Beispiels sie zurückscheucht.

In a review "Über den gegenwärtigen Zustand des deutschen Parnasses" in Wieland's *Teutscher Merkur* (1773), C. H. Schmid, referring again to *Götz von Berlichingen*, writes:⁸¹

Doch ein originelles Phänomen ist für unsre Bühne erschienen, dem wir gern freudigen Beyfall zuruftun, wenn es nicht zu sehr die Merkmale der schon ehemals beseufzten Originalsucht an sich trüge.

Nicolai's parody of *Werther*, entitled *Die Freuden des jungen Werthers* (1775), pictures Werther in trouble with his neighbor. Werther remarks:⁸²

Der Kerl ist traun 'n Genie, aber 'ch merks wohl, ein Genie ist ein schlechter Nachbar: Wenns einem selbst auch wohl thut, als ein Genie sprechen, so thut's andren gar schier übel, wenn man als ein Genie handelt.—Wir wollen's Genie auch nicht einschränken, denn der Kerl ist reich und mächtig, und Klagen thut nichts. Aber wenn wir dem Genie aus dem Wege gehen könnten!

⁷⁶ Halle, 3. Band, 1. Teil, p. 169.

⁷⁷ 4. Band, 2. Teil, p. 227.

⁷⁸ 2. Band (July-December, 1776), p. 1051.

⁷⁹ Reprinted by G. Ellinger, *Berliner Neudrucke* III, 2, No. 7. The quotation is from page 56 of this edition.

⁸⁰ Suphan ed., 1, 256. Cf. also what Herder says in 1778 (*ibid.*, 8, 223 ff.).

⁸¹ May, pp. 150-152. Cf. also *ibid.*, December, pp. 257-259.

⁸² Quoted by Braun, *op. cit.*, p. 76.

Referring to this passage, Lessing writes to Wieland on February 8, 1775:⁸³

Der Kerl ist ein Genie, aber ein Genie ist ein schlechter Nachbar: sagt Nicolai sehr gut in seinem, wo nicht bessern, doch klügern Werther.

In the same letter Lessing expresses his contempt of Storm and Stress by the following remarks:

Alles Genie haben jetzt gewisse Leute in Beschlag genommen, mit welchen ich mich nicht gern auf einem Wege möchte finden lassen.⁸⁴

On another occasion he says:

Wer mich ein Genie nennt, dem geb ich ein paar Ohrfeigen, dass er denken soll, es sind vier.⁸⁵

Also referring to Nicolai's *Werther*, the *Berlinische Nachrichten von Staats- und Gelehrten Sachen* (1775) describe how in the course of the story Werther becomes a rational being and a sensible citizen and neighbor:⁸⁶

Eben diese Umstände lehren ihn zuletzt einsehen, dass bloss Genie den Menschen nicht glücklich, aber wohl ihn und seinen Nachbar unglücklich machen könne.

Schirachs Magazin der deutschen Kritik (1775), attacking Goethe's *Neueröffnetes moralisch-politisches Puppenspiel*, says:⁸⁷

Sind wir armen Deutschen denn so gar unglücklich, so sehr vom Genius verlassen, dass unsre Genies, bis auf Harlikinaden hinab, nachahmen müssen, indem sie eben Originale seyn wollen?

Lichtenberg has already been mentioned as one of the staunchest enemies of Storm and Stress. From the very outset an opponent of the movement, his second trip to England (1774-1775) particularly opened his eyes with regard to the shortcomings of German literature. Thus in his *Briefe aus England* he speaks in a general way of "junge geniesüchtige Originalköpfe."⁸⁸ His opposition to the young hotspurs did not crystallize, however, until Nicolai suggested to him to write a satire directed specifically against the "Original-genies." The result was the satirical skit *Parakletor oder*

⁸³ See E. Schmidt, *Lessing*, 3. Aufl., II, Berlin, 1909, p. 635.

⁸⁴ Muncker ed. 18, 129.

⁸⁵ E. Schmidt, op. cit., II, 57.

⁸⁶ Braun, op. cit., p. 78.

⁸⁷ Halle, 4. Band, 1. Teil, p. 180.

⁸⁸ *Schriften*, III, 208.

*Trostgründe für die Unglücklichen, die keine Originalgenies sind (1776).*⁸⁹ The following passages are characteristic. The first:⁹⁰

Deutschland hat so lange nach Originalköpfen geseufzt, und jetzt, da sie allein am Musenalmanach zu Dutzenden sitzen, klagt man überall über die Originalköpfe. Keine Messe ginge mehr wie unter Franz I., der Eine hinkte, der Andere affectirte ein steifes Knie, der Dritte schlug ein Rad, der Vierte Purzelbäume, der Fünfte ginge auf Stelzen, der Sechste machte den Hasentanz, der Siebente hüpfte auf einem Bein, der Achte rollte, der Neunte ritt sein spanisches Rohr, der Zehnte ginge auf den Knien, der Elfte kröche, und der Zwölfte rutschte.⁹¹

The second:⁹²

Wenn ich originell schreibe, z. E. in synkopischen Sentenzen, fluche und schimpfe wie Shakespear, leyre wie Sterne, senge und brenne wie Swift . . . Kaum war die Losung gegeben: wer original schreiben kann, der werfe seine bisherige Feder weg, als die Federn flogen wie Blätter im Herbst. Es war eine Lust anzusehen, 30 Yoricke ritten auf ihren Stecken Pferden in Spiralen um ein Ziel herum, das sie den Tag zuvor in einem Schritt erreicht hätten.

The aphorisms of Lichtenberg, too, are full of caustic references to the so-called "Genies."

D 364:⁹³ Der Deutsche ist nie mehr Nachahmer, als wenn er absolut Original seyn will.

E 80:⁹⁴ Gewiss kan in Deutschland nichts der Aufmerksamkeit eines satyrischen Kopfs würdiger seyn, als der jezt so allgemein gewordene lächerliche Eyfer Original zu seyn. Es gehn über diesem bemühen die besten Köpfe zu Grunde.

In E 433⁹⁵ he berates "Genies" who overload their so-called Volkslieder with recondite mythology. He is thinking no

⁸⁹ Lichtenberg writes to Nicolai on September 2, 1776 (Leitzmann and Schüddekopf, *Lichtenbergs Briefe*, 3 Bände, Leipzig, 1901-1904, I, 262): "Meine Schrift (Parakletor) . . . ist eigentlich ein Versuch einen Vorschlag auszuführen, den Sie mir einmal vor ein paar Jahren thaten, meine Satyre gegen die verderbliche Geniesucht unserer Zeit zu wenden."

⁹⁰ *Schriften*, II, 207.

⁹¹ Kleinebst, G. C. *Lichtenberg in seiner Stellung zur deutschen Literatur*, Strassburg, 1915, p. 8, is undoubtedly correct in seeing a similarity between this passage and the drawing of Chodowiecki entitled "Kraft-Genies," reproduced in Vogt and Koch, op. cit., II, 229. "It is indeed likely that Lichtenberg's text suggested the idea of the drawing to Chodowiecki. But as early as 1773 C. H. Schmid had written in the *Teutscher Merkur*, II, 5, p. 164 f.: "Nicht wenige versuchen es daher auf dem Kopf zu gehen, um sich nicht der Füße mit dem gemeinen Haufen zu bedienen."

⁹² Ibid. Both passages are also parts of Aphorism D604, *Literaturdenkmale*, 3. Folge, vol. 11, pp. 195-196. They are likewise quoted by Sauer in D.N.L. 79, introduction, p. 54. Cf. also the notes of Leitzmann in *Literaturdenkmale*, loc. cit., p. 263 ff.

⁹³ *Literaturdenkmale*, 3. Folge, vol. 11, p. 364.

⁹⁴ Op. cit., vol. 16, p. 20.

⁹⁵ Ibid., p. 113.

doubt of the Anacreontic writers and the *Hainbund*, whom he includes among the "Genies."

E 497:⁹⁶ So viel ist gewiss, keine Nation führt das Wort Genie so oft im Munde als die deutsche seit 6 bis 8 Jahren, und nie sind die Genies seltner gewesen.

Aphorisms F 63⁹⁷ and F 1117⁹⁸ also contain digs at Storm and Stress.

In the *Bittschrift der Narren*, another severe attack against the movement, Lichtenberg, parodying at the same time the style of Storm and Stress, remarks:⁹⁹

O wenn wir Worte hätten! ein Buch ein Wort, ein Wort ein Buch, aber hoher Genius, und euer Deutsch, eure Grammatik! . . . Gabs'n, wolt's n't fress'n. Siehst's Genie? Wie's 'n Wolk'n webt? Ob d's Genie siehst? Wenn d's nit siehst, host d'n Nosen nit's Genie zu riechen?

All these and many other passages from Lichtenberg's works¹⁰⁰ stamp him as one of the most savage enemies of Storm and Stress in all Germany.

Lenz, than whom there was no more ardent supporter of the movement, gives a half-humorous description of a "Genie," as he is pictured by his enemies, in the poem *L'Eloge de feu Monsieur* . . . *nd* (1775):¹⁰¹

Und wollte gar ein Kerl behaupten, sie [the Medusa] sei schön,
So war er ein Genie, wie wir das Wort verstehn:
Ein Ungeheur mit funkelnd hohlem Munde,
Mit mehr als einem bösen Geist im Bunde,
Ein wilder Gems, der immer hopsa springt.

Claudius, too, wrote a skit on the "Genie" in his *Nachricht vom Genie* (1776):¹⁰²

Ein Fuchs traf einen Esel an:
Herr Esel, sprach er, jedermann
Hält Sie für ein Genie, für einen grossen Mann.
Das wäre! fing der Esel an;
Hab doch nichts Nürrisches getan!

⁹⁶ Ibid., p. 124.

⁹⁷ Ibid., pp. 146-147.

⁹⁸ Ibid., p. 322.

⁹⁹ *Schriften*, II, pp. 225-226. Also quoted by Sauer, D.N.L. 79, pp. 54-55.

¹⁰⁰ Cf. *Schriften*, III, 36, 208, 212; IV, 15, 188, 193, 199, 241; V, 100, 107, 281; VI, 327. Cf. also IV, 261, where he prefers the writings of Gellert to "jetzige Genie-Seherei und Genie-Flegelei."

¹⁰¹ F. Blei, *Gesammelte Schriften von Lenz*, vol. I. München and Leipzig, 1909, p. 91.

¹⁰² D.N.L., Göttinger Dichterbund, 3, p. 272.

The *Göttinger Musenalmanach* (1777) has the following anonymous poem:¹⁰³

Nimm sechsgesilbte Wörter fein
Misch etlich dunkle Bilder drein,
Dazu noch etwas Adlerblut,
Gedörrte Schädel sind auch gut;
Lass alles mählich destillieren,
Danach mussts durcheinander rühren,
Schütts in einen alten deutschen Pokal;
Kömmt flugs dir eine Raserey:
Trink und vomirs nun ohne Scheu;
Wirst sehn 's ist 'n Original.

Just as Lichtenberg had included the Göttingen poets among the "Genies," so Nicolai counted Voss among them in a note appended to a review in the *Allgemeine Deutsche Bibliothek* (1779):¹⁰⁴

Hr. Voss sollte sich in Acht nehmen, dass er nicht in Otterndorf mehr verwildere. Wer ein Genie der neuesten Art gewesen ist, das Grobheit für Kraft hält, und wird darauf Rektor in einem kleinen Städtchen, läuft grosse Gefahr, seinen Eigendünkel für Bewusstsein der Superiorität zu halten.

Finally attention is called to the anonymous five-act satirical comedy *Das Geniewesen*.¹⁰⁵

The element of "Kraft" has already appeared in various quotations. It comes out more clearly in others. As early as 1773 Nicolai uses the expression "Kraft- und Wunderpartei" in a letter to Lavater¹⁰⁶—perhaps under the influence of Lavater.¹⁰⁷ The expression "Kraft- Genie- und Wunderpartei" is also used, with reference to Kaufmann, in a letter of Petersen to Nicolai of January 12, 1778.¹⁰⁸ In an unpublished letter of Nicolai to Höpfner, dated April 13, 1775,¹⁰⁹ we read:

Ich gestehe, ich bedaure die Leute herzlich, die so viel von Kraft und Selbständigkeit plaudern und bei dem geringsten Widerspruch aus der

¹⁰³ P. 48. Quoted by Kleineibst, op. cit., p. 8.

¹⁰⁴ Vol. 39, No. 1, p. 310.

¹⁰⁵ Frankfurt and Leipzig, 1781. See Goedeke, IV, III, 132, who conjectures that Hottinger is its author. See also Hedwig Waser, *Eine Satire aus der Geniezeit*, in *Vierteljahrsschrift für Literaturgeschichte*, 5, 249 ff. See also the term "Geniedrang" quoted above from Hildebrand.

¹⁰⁶ Quoted by Sommerfeld, op. cit., p. 226.

¹⁰⁷ For Lavater's ideas on "Wunder" see Janentzky, op. cit., p. 266.

¹⁰⁸ Sommerfeld, op. cit., p. 281.

¹⁰⁹ Quoted by Sommerfeld, pp. 260-261.

Haut fahren wollen. Bei ihnen müssen beständig ihre Principien mit ihrem bürgerlichen Leben in Collision kommen und sie unmutig machen.

With Maler Müller, as with all the Storm and Stress writers, "Kraft" is a favorite word. We quote from his dedication of *Fausts Leben* to von Gemmingen, as a typical illustration of the predilection for the word at the time:¹¹⁰

Neu gestärckt dann, Unsterblichen gleich, wir in Ihren Heldenwagen sprangen, gastfrei und bieder Sie, ein anderer Odyseus, den Zügel ergriffen, die zwei braune stolz wiehernde Halbgöttinnen voran zu jagen, die ihrer Kraft wegen mir so lieb sind.

The *Erfurtische Gelehrte Zeitung* of July 24, 1781, discussing Schiller's *Räuber*, says:¹¹¹

Haben wir je einen teutschen Shakespear zu erwarten, so ist es dieser. Aber eben diese grose Hofnung berechtigt uns auch zu gröseren Forderungen, als die Alltagskost für unsere gewöhnliche Kraftmänner, und süse Geisterchen.

"Kraftgenie" is the title of one of Stäudlin's *Vermischte Poetische Stücke* reviewed in the *Wirttembergisches Repertorium*, perhaps by Schiller.¹¹²

In his prize essay *Von den Ursachen der Allgemeinheit der französischen Sprache* (1784), Johann Christoph Schwab speaks as follows:¹¹³

Wehe unserer Sprache, wenn daselbst einmahl eine Deutsche Akademie errichtet werden, und in dieser die neuern Kraftgenies die Oberhand bekommen sollten!—Unsere Franzosen-Hasser, die meistens Sprachverderber sind, sehen nicht ein, wie sehr sie Frankreichs Herrschaft in Deutschland begünstigen: denn wenn sie fortfahren, unsere Sprache zu zerrütten, so werden wir endlich alle Französisch reden und schreiben müssen.

The complaint of Schwab, just noted, is voiced also, so far as punctuation is concerned, by Iffland. Altho his point of view is chiefly that of the actor, his remarks are of general applicability. The passage is from the little volume entitled *Fragmente über Menschendarstellung auf den deutschen Bühnen*, Erste Sammlung, already quoted above:¹¹⁴

Die Deutlichkeit des Sinnes dem Leser zu übergeben, ward die Interpunction eingeführt. Man ist zu dem Ende über gewisse Zeichen allgemein einig geworden. In den letzten Zeiten aber, haben einige grosse

¹¹⁰ Literaturdenkmale, vol. 3, pp. 5-6.

¹¹¹ Braun, *Schiller im Urtheile seiner Zeitgenossen*, I, Leipzig, 1882, p. 1.

¹¹² See Weltrich, *Friedrich Schiller*, I, Stuttgart, 1899, p. 562.

¹¹³ See Zeydel, *Johann Christoph Schwab on the Relative Merits of the European Languages*, *Philological Quarterly* (University of Iowa), III, 4, p. 301.

¹¹⁴ P. 84.

Männer sich eine Interpunktion auch für den Ausdruck des Gefühls oder der Eigenheit gewählt, und da gebraucht, wo Geistesstärke, Eigenheit der Wendung, Neuheit des Dialogs und der Sprache, die gewöhnliche Interpunktion der trockenen Moral und Amtsbescheide nicht vertragen konnten. Seit dem sind, von Yoricks Reisen bis zu jeder Kalendergeschichte, die Querbalken, Schlachtschwerter, halbe Reihen Striche, ganze Reihen Pünktchen, ja sogar die Knippel—in allen Messproduktionen erschienen.

With certain miscellaneous references to Storm and Stress or to individual writers of the movement we shall bring our examination to a close.

Brückner, complaining to Voss about the studied obscurity of the Storm and Stress writers, says:¹¹⁵

Ist's nicht des Dichters Pflicht, sich alle mögliche Mühe zu geben, für die meisten Leser verständlich und leicht zu sein? Lass uns immerhin kleiner sein, wenn wir nur nützlicher sind; das ist eigentlich allein wahre Grösse.

Höpfner writes to Nicolai on August 12, 1775, about "die Leuten aus der Goetheschen Schule" and "die Goetheaner, die Halbgötter," and on April 24, 1776, about

die Goetheaner, die geradezu alles für Ochsen und Esel erklären, was nicht zu ihrer Schule gehört oder ihren Helden Goethe anbetet.¹¹⁶

In a review of certain works of Hamann, Nicolai writes in the *Allgemeine Deutsche Bibliothek* (1775):¹¹⁷

. . . seit eininger Zeit steht eine Gattung feuriger Jünglinge auf, die Suppen, so wie alles, was nicht stark ist, äusserst verachten.

In January, 1777, Kästner, ridiculing the Storm and Stress dramas and their subject-matter, urges Nicolai to publish

. . . eine Sammlung von Haupt- und Staatsaktionen zum Gebrauch unserer dramatischer Dichter.¹¹⁸

In 1777 Nicolai published his *Kleyner feyner Almanach—erster Jahrgang*.¹¹⁹ The Introduction, written in a happy, satirical vein and in a lumbering, archaic style, is full of digs at Nicolai's old enemies, the Storm and Stress writers. It professes to be the work of a cobbler who has reached the con-

¹¹⁵ Abraham, *Briefe an Voss*, I, 183.

¹¹⁶ All three passages quoted in Sommerfeld, *op. cit.*, pp. 275-276.

¹¹⁷ Vol. 24, p. 287 f.

¹¹⁸ Sommerfeld, *op. cit.*, p. 282.

¹¹⁹ See Sommerfeld, *op. cit.*, p. 282 f.

clusion that cobbling and poetizing are on the same plane and hence may be compared. He says:¹²⁰

Denn ob schon in disen letzten betrubten Zeiten, die Welt sich wol umkehrte hett, dz di Poeten grosse Hansen worden, unndt eyne erbern Schuster schier eben uber d' Achsel ansehn mügen; wars doch wol bey den liben Alten fast anders.

In the course of time, our cobbler tells us, poetry came into the hands of the cobblers and linen-weavers, the former writing the songs, the latter singing them. Presently the linen-weavers arrogated to themselves all the fame that rightly belongs to the poets. He continues:¹²¹

. . . (die Leineweber) taufenn, gantz heymlich, sint etwelcher Zeyt, gewandsweyse allerley hipsche und artliche Enyfäll in der Poeterei, den ersten Wurff, als ob ettwan eyne Leineweber seyn Schiff wurfe, taufenn eyne hohen Sinnesbegriff der schlumps den Poeten antritt, eyne Sprung, gleich als ob dem Weber, fur zu grobem Wurf, eyne Faden sprange. Ist aber eytel Mischmascherey mit solchen almodischen Genammsel, denn's solten, solch schnell unndt gewaltig Einfelle der Poeten, nicht so fast, der erste Wurff, als der erste Schnitt benamset werden. Haben denn wol unsere lieben Vorfaren an der Poeterei unndt an der Schusterei, ob sie eyne Reyen zu dichten, oder eyne Sole zu schneyden hatten, eyne Winkelmass angelegt? Mit nichten. Dichten unndt Schustern geschah, uffm ersten Schnytt, frey, auss innerm Drang eyne Sole zu schneyden.

He goes on to say (p. 5):

Mit der liben Poeterey, ists denn nun, Gott erbarme, gar zu Ende. Uber dem Versmachen mocht keyner mer den ersten Schnitt, oder dz ich nach leinweber Art unndt Kunst spreche, den ersten Wurff, fulen können.

Furthermore (p. 5):

. . . kluge Handwerksbursche wissen fast wol, dz Poetry Hertzens-Ausguss ist, unndt wie 'n Piltz aus feuchtem Balcken, ungeset unndt unverlangt, aus innerm Drang hervorschwellen muss.

Then he turns directly upon the "Genies" (p. 6):

Zwaren spuret man hin unndt her, neue Gesellen, nennen sich Genyes, schwetzen d' Lang unndt d' Queer, von Volcksliedern, vom Wurfe unndt Sprunge; 's aber eytel Mummerey mit den Kerlen, 's sind doch Verse-macher. Wollen eben wz neues haben, wollen Oren kitzeln, wollen feynen Damen neue Lydlein vormachen, stelen darob, aus Volcksliedern, hie 'n Wort, da 'n Wort, flicken's in jre Verse, machen 'n Schnitt queereyn, als wer's erster Schnitt mag doch solch Mummenschanze nicht

¹²⁰ Friedrich Nicolais *Keyner feyner Almanach* 1777 (1. Jahrgang) herausgegeben von Georg Ellinger (Berliner Neudrucke, I, Berlin, 1888), p. 3.

¹²¹ Op. cit., p. 4.

ercklecken, dz eyn erber Handwerkspursch solch almodische Reyen singen solt, möchtens feyne Damen, kann unser eyns nicht wissen. 'Sind eben unnder derley Genyes, gar grobe Knollen mit unnder, meynens feyn naturlich, wenns ungehobelt unndt plump ist.

Further caustic references to the "Schnitte," "Wurffe,"¹²² and "Sprunge" of the "Genye" (pp. 7-8) conclude the Introduction.

Later in life, Nicolai, looking back upon his relations to the writers of Storm and Stress, said not without force:¹²³

Ich ward zur Gesellschaft der kalten Hunde gerechnet . . . weil ich nicht glaubte, mich an einem Haufen Johanniswürmchen wärmen zu können.

Justus Möser, as a defender of the German language and literature, judges the movement much more mildly in his essay *Über die Deutsche Sprache und Literatur* (1781). He says:¹²⁴

Auch die Klinger, die Lenze und die Wagner zeigten in einzelnen Theilen, eine Stärke wie Herkules, ob sie sich gleich auch wie dieser zuerst mit einer schmutzigen Arbeit beschäftigten, und vielleicht zu früh für deutsche Kunst und ihren Ruhm verstarben.

Finally, we shall conclude our quotations with two rather lengthy passages from the anonymous two-volume work of Johann Kaspar Riesbeck entitled *Briefe eines reisenden Franzosen über Deutschland an seinen Bruder zu Paris. Übersetzt von K.R.* The *Briefe* first appeared in 1783; a second revised edition was published in 1784. We shall use the "zweyte beträchtlich verbesserte Ausgabe" as our basis. The passages are quoted here *in extenso* both because of the inaccessibility of the work and the slight attention that has been accorded it in our day.¹²⁵

A passage in the first volume (pp. 70-78) reads:

Schon zu Strassburg erfährt man, wenn man die deutsche Sprache versteht, dass Deutschland seit einigen Jahren mit einer Art von Theaterwuth befallen ist. Da werden die Buchläden von Zeit zu Zeit mit einem

¹²² Cf. the expression "Wurf- und Schwungmänner" quoted above from the *Wörterbuch*. Nicolai's ridicule of "Drang" in these passages is also significant.

¹²³ G. E. Lessings *sämmtliche Schriften*, 27. Teil, Berlin, 1794, herausgegeben von Friedrich Nicolai, p. 253, note.

¹²⁴ *Literaturdenkmale*, 3. Folge, No. 2, p. 19. The passage quoted furnishes additional evidence also that when it was written (1781) the Storm and Stress movement was considered dead.

¹²⁵ The only pertinent quotation from it which we have been able to find—an excerpt on Goethe—is in the *Transactions of the Manchester Goethe Society*, 1894, p. 182.

ungeheuern Schwall von neuen Schauspielen, Dramaturgien, Theateralmanachen, Theaterkroniken und Journalen überschwemmt, und in den Katalogen neuer Bücher nehmen die Theaterschriften allzeit richtig den dritten Theil ein. Ich halte selbst das Dramatisiren für die höchste Stufe der Dichtkunst, so wie das Geschichtemalen für den edelsten Theil der Malerey. Es soll uns den edelsten Theil der Schöpfung, den Menschen in seinen mannichfaltigen Verhältnissen am anschaulichsten und mit der grössten Wahrheit darstellen. Aber die Art Menschen, welche jezt in den meisten deutschen Schauspielen herrscht, findet man unter dem Mond höchst selten, und wenn hie und da einer von dieser Art von ohngefähr erscheint, so nimmt die Polizey des Orts, wenn eine da ist, gewiss die Versorgung desselben über sich, und thut ihn ins Toll- oder Zuchthaus.

Stelle dir vor, lieber Bruder, die jezigen Lieblingskaraktere des dramaturgischen deutschen Publikums sind rasende Liebhaber, Vatermörder, Strassenräuber, Minister, Mätressen, und grosse Herren, die immer alle Taschen der Ober- und Unterkleider voll Dolche und Giftpulver haben, melancholische und wüthende Narren von allen Arten, Mordbrenner und Todtengräber. Du glaubst es vielleicht nicht, aber es ist die Wahrheit, dass ich dir über 20 Stücke nennen kann, worin verrückte Personen Hauptrollen spielen, und der Dichter seine Stärke in der Schilderung der Narrheit gesucht hat. Und was sagst du, wenn ich dich auf meine Ehre versichere, dass das deutsche Publikum, welches ich bisher zu kennen die Ehre habe, gerade die Stellen am stärksten bewundert und beklatscht, wo am tollsten geraset wird?—Man hat Stücke, worin die Hauptperson alle 12 bis 15 mitspielende Personen der Reihe nach umbringt, und sich dann zur Vollendung des löblichen Werkes den Dolch selbst in die Brust stösst.—Es ist ausgemacht, dass die Stücke den meisten Beyfall haben, worin am häufigsten geraset und gemordet wird, und verschiedene Schauspieler und Schauspielerinnen konnten mir nicht genug beschreiben, was sie für Noth hätten, um auf verschiedene neue Arten sterben zu lernen. Es kommen Stellen vor, wo Leute unter abgebrochenen Reden und anhaltenden Konvulsionen eine halbe Stunde lang in den lezten Zügen liegen müssen, und das ist doch wahrlich kein geringes Stük Arbeit, einen solchen Tod gehörig zu souteniren. Du solltest nur manchmal eine deutsche Schaubühne sehn, wo vier bis fünf Personen auf einmal auf dem Boden liegen, und der eine mit den Füßen, der andre mit den Aermen, der mit dem Bauch, und jener mit dem Kopf seinen Todeskampf ringt, und das Parterre unterdessen jede Zuckung beklatscht.

Nach den Rasenden und Mördern behaupten die Besoffenen, die Soldaten und Nachtwächter den zweyten Rang auf der deutschen Bühne. Diese Personagen entsprechen dem Nationalkarakter zu sehr, als dass sie einem deutschen Zuschauer auf der Bühne nicht willkommen seyn sollten. Aber warum der phlegmatische Deutsche, der zu stürmischen Leidenschaften, zu rasenden Unternehmungen, zu starken tragischen Zügen so wenig Anlage hat, so verliebt in die Dolche, Giftmischereyen und hitzige Fieber auf dem Theater ist, das konnte ich mir anfangs so leicht nicht erklären.

Auf der Seite des Publikums mag wohl der Mangel an mannich-

faltigern Kenntnissen des bürgerlichen Lebens und am geselligen Umgang eine Ursache davon seyn. Die verschiedenen Volksklassen kreuzen sich in den deutschen Städten nicht auf so verschiedene Art, wie in den Französischen. Alles, was Adel heisst, und wenn auch der Adel nur auf dem Namen beruhen sollte, und alles, was sich zum Hof rechnet, ist für den deutschen Bürger verschlossen. Seine Kenntnisse, seine Empfindungen von gesellschaftlichen Situationen, sind also viel eingeschränkter, als jene unserer Bürger. Er hat kein Gefühl für unzählige Verhältnisse des gemeinen Lebens, die der Bewohner einer mittelmässigen französischen Stadt gehörig zu schätzen und zu empfinden weiss. Bey dieser Gefühllosigkeit für bürgerliche Tugenden und Laster, bey dieser Stumpfheit für die Verkettungen und Intriguen des gewöhnlichen gesellschaftlichen Lebens, hat nun der deutsche Bürger natürlich zu seiner Unterhaltung im Theater Karrikaturen und starke Erschütterungen nöthig, da sich der Franzose mit einem viel feinern Spiel der Maschinen eines Theaterstückes begnügt, und seine eigene Welt gerne auf der Bühne vorgestellt sieht, weil er sie kennt. Die Theaterstücke, welche man aus Sachsen bekommt, sind nicht so abentheuerlich und ungeheuer, als die, welche in dem westlichen und südlichen Theil von Deutschland gemacht werden, weil ohne Zweifel mehr Aufklärung, Sittlichkeit und Geselligkeit unter den Bürgerständen daselbst herrscht, und man also auch die Schattirungen der Auftritte des gemeinen Lebens besser fühlt, als hier. Überhaupt ist hier zu Lande der grosse Haufen mehr Pöbel als in Frankreich, und bekanntlich läuft der Pöbel gerne zum Richtplatz und zu Leichen.

Auf der Seite des Dichters hat diese tragische Wuth verschiedene Ursachen. Die meisten der jeztlebenden deutschen Schauspielschreiber haben das mit dem übrigen Pöbel gemein, dass sie die Fugen und das Spiel des bürgerlichen Lebens gar nicht kennen. Viele derselben sind Studenten, die noch auf der Schule sitzen, oder so eben davon zurückgekommen sind, und das Schauspielmachen zu ihrem Metier erwählt haben. Da schmauchen sie ohne alle Weltkenntniss hinter ihrem Ofen, phantasiren sich in den Tabakswolken eine Riesenwelt, worin sie als Schöpfer handeln können, wie es ihnen beliebt, und ihren Kreaturen keine Schonung, keine Ausbildung, keine Polizey, und keine Gerechtigkeit schuldig sind. Da ist es nun kein Wunder, dass aus diesen Wolken so viele Menschen ohne Köpfe, und so viele Unmenschen mit Köpfen herauspringen. Sie suchen die tragische Stimmung des Publikums zu benutzen, um mit der grössten Leichtigkeit ihr Brod zu gewinnen; denn, ohne auch das willkührliche Abentheuerliche in Anschlag zu bringen, so ist es doch allzeit leichter eine Tragödie, als eine Komödie von gleicher Güte zu machen.

Ein anderer Theil dieser Kothurnaten lässt sich von dem herrschenden Geschmack verführen. Da trat vor einigen Jahren ein gewisser Göthe, den du ohne Zweifel nun aus einigen Übersetzungen kennst, mit einem Stük auf, das seine sehr grosse Schönheiten hat, aber im Ganzen das abentheuerlichste ist, das je in der Theaterwelt erschienen. Ich brauche dir weiter nichts zu sagen, um dir einen Begriff davon zu geben, als dass der Bauernkrieg, unter Kaiser Maximilian, mit brennenden Dörfern, Zigeunerbanden und Mordbrennern mit den Fackeln in

der Hand, auf die anschaulichste Art vorgestellt wird. Es heisst, Götz von Berlichingen mit der eisernen Hand, und hat verschiedenen Versuchen ungeachtet, zum grossen Leidwesen des deutschen Publikums, noch nicht auf das Theater gebracht werden können, weil die häufigen Veränderungen der Scenen, die erstaunlich vielen Maschinen und Dekorationen zu viel Aufwand erfordern, und zwischen den Auftritten gar zu lange Pausen verursachen. Göthe ist wirklich ein Genie. Ich habe einige andere Theaterstücke von ihm gelesen, und aufführen gesehen, worin man sieht, dass er die Menschen, die wie er, auf ihren zwey Beinen gehen, in dem alltäglichen Leben eben so gut zu behandeln weiss, als die, welche auf dem Kopf stehen. Mit Vergnügen sahe ich sein Erwin und Elmire, eine sehr niedliche Operette, und seinen Klavigo, ein Trauerspiel, wozu unser Beaumarchais, wie du weisst, den Stof gegeben. Dieses hat zwar seine starken Ausschweifungen; aber einem Genie ist alles erlaubt. Nun drängte sich ein unzähliger Schwarm von Nachahmer um den Mann. Sein Götz von Berlichingen war ein magischer Stab, womit er einige Hundert Genies auf einen Schlag aus dem Nichts hervorrief. Stumpf gegen die wahren Schönheiten des Originals, suchten die Nachahmer ihre Grösse darin, die Ausschweifungen desselben treulich zu kopiren. Im Götz von Berlichingen wird mit jedem Auftritt das Theater verändert. Ein gutes Stük musste also nun, der Reihe nach, wenigstens eine ganze Stadt durchlaufen, von der Kirche an, durch die Rathsstuben, Gerichtshöfe, über die Marktplätze, bis zur Wahlstatt. Da Göthe etwas verschwenderisch mit den Exekutionen umgieng, so wimmelte es nun in der deutschen Theaterwelt von Scharfrichtern. Shakspear, den Göthe vermuthlich bloss aus Laune, oder vielleicht in der guten Absicht, um seine Landsleute auf diesen grossen Dichter aufmerksamer zu machen, in seinem Götz zum Muster genommen, Shakspear war nun der Abgott der deutschen Theaterdichter; aber nicht der Shakspear, welcher dir die Menschen wie Raphael in jeder augenblicklichen Stimmung, in allen Nuanzen der Handlungen, mit jeden Bewegungen der Muskeln und Nerven, mit jeder Schattirung der Leidenschaften, mit aller möglichen Wahrheit darstellt; sondern der Shakspear, welcher aus Mangel mit einer Bekanntschaft mit andern Originalien, und einer gehörigen Ausbildung, sich mit aller Gemächlichkeit seiner Laune überliess, mit Flügeln seines Genies über Jahrhunderte, und ganze Weltkreise wegflog, und sich im Gefühl seiner vorschwebenden Gegenstände um keine Einheiten, und um keinen Wohlstand kümmerte. Ein Geschichtmahler kann unendlich stark im Ausdruk einzelner Personen oder Partheyen seyn, und die anständige Zusammensetzung, das, was man Haltung heisst, und verschiedene andere Dinge vernachlässigen; aber wenn sein Schüler, in Nachahmung dieser Nachlässigkeit seine Stärke sucht, so ist er wahrhaftig zu bedauern.

Die Regeln sind keine Sklavenfesseln für das Genie. Entweder trägt es sie wie Blumenketten, ungezwungen, leicht, und mit Anstand, oder, wenn es den Werth dieses Schmuckes nicht kennt, wenn es in seiner natürlichen Wildheit auftreten will, so ersetzt es durch die unbändige Stärke, womit es seine Gegenstände umfasst, die vernachlässigten Verzierungen. Aber solche stürmische Genieen sind höchst selten, und platterdings nicht zum Nachahmen in den Manieren gemacht. England hat

seit so vielen Jahrhunderten nur einen Shakspear, man muss sagen, ganz Europa hat nur einen hervorgebracht. Der grösste Theil der kunsttreibenden Erdensöhne wird immer durch angestrenktes Studiren seine Grösse suchen müssen, und die Regeln sind zur Prüfung des Studiums gemacht.

Dieser lächerliche Geschmack, durch die Vernachlässigung des Wohlstandes und der Regeln, durch affectirte Ausgelassenheit, abentheuerliche Situationen, abscheuliche Grimassen, und erbärmliche Verunstaltungen glänzen zu wollen, hat seit dieser Zeit alle Theile des litterarischen und kunsttreibenden Deutschlands angesteckt. Man hat junge angebliche Genies in der Menge, die in ihren verschiedenen Fächern, in der Musik, in der Malherey, in andern Theilen der Dichtkunst um so grösser zu sein, wähnen, je weiter sie sich von den Regeln entfernen, und je weniger sie studiren. Die Alten dachten anders hierüber, und die Werke, welche sie uns hinterlassen haben, werden von diesen vorgeblichen Urgenien gewiss nicht verdunkelt werden. Virgil verglich seine Produkten der unförmlichen Geburt einer Bärin, die bloss durch vieles Leeken eine Gestalt bekommen muss, und man sieht dem Terenz und Plautus gewiss an, dass sie eine Scene ihrer Schauspiele nicht bey einer Pfeife Tabak vollenden konnten.—Du weisst, dass Shakspear auch unter uns seit einiger Zeit seine Anhänger hat. Aber dazu wird es doch so leicht nicht kommen, dass seine Ausgelassenheit Regel wird, und wenn auch gleich Arnaud den Ungeheuern den Weg auf unsere Bühne geöffnet hat, so sind sie doch bisher zu selten erschienen, als dass wir Gefahr liefen, die gewöhnlichen Menschen und unsere ehrlichen, bekannten Mitbürger durch dieselben davon verdrängt zu sehen.

In der deutschen Sprache machte dieser verdorbene Geschmack eine merkwürdige Revolution. Wenn man die Schriften eines Gessners, Wielands, und Lessings liest, so sieht man, dass die Sprache im Gang zu ihrer Ausbildung war, und nach und nach die Ründung und Politur bekommen haben würde, die zu einer klassischen Sprache unumgänglich nöthig ist. Aber den neugeschaffenen Genies war es nicht genug, in ihrer erzwungenen Wuth einzelne Wörter zu verstümmeln; sondern sie gingen mit ganzen Perioden eben so grausam um. Alle Verbindungswörter wurden abgeschafft, und alle Gedankenfugen getrennt. In vielen neuern Schriften stehen die Sätze alle wie unzusammenhängende Orakelsprüche da, und man findet keine Unterscheidungszeichen darin, als Punkten, und ! ! ! und ? ? ? und — — —. Jeder wollte sich zu seinen anmasslichen Urideen auch neue Wörter schaffen, und du müsstest dich krank lachen, wenn du gewisse literarische Produkte Deutschlands, die von vielen für Meisterstücke gehalten werden, kennen solltest.

A passage in the second volume (pp. 56-61) deals more specifically with Goethe.

Göthe ist der Liebling des Herzogs. Sie sind Du zusammen. Was die Natur Herrn Wieland gänzlich versagte, das gab sie Herrn Göthe im Übermass. Ehedem verleitete ihn seine Suffisance wirklich zu Ausschweifungen; allein er hat sich seit einigen Jahren merklich geändert. Er ist nicht nur ein Genie, sondern hat auch wirklich viel Ausbildung.

Einige sonderbare Grundsätze trugen mehr dazu bey, als seine natürliche Raschheit, dass er—gewiss gegen seine Erwartung—einer Kalmückenhorde das Signal gab, den deutschen Parnass, der in voller Blüthe stand, vor einigen Jahren zu verheeren. Er ist in allen Dingen—aus Grundsatz—für das Ungezierte, Natürliche, Auffallende, Kühne und Abentheuerliche. Er ist der bürgerlichen Polizey eben so feind als den ästhetischen Regeln. Seine Philosophie gränzt ziemlich nahe an die rousseauische. Ich will mich nicht damit aufhalten, sie zu zergliedern.—Als das Gefühl seines Genies in ihm erwachte, gieng er mit abgekremptem Hut und unfrisirt, trug eine ganz eigne und auffallende Kleidung, durchirrte Wälder, Hecken, Berg und Thal auf seinem ganz eignen Weg; Blick, Gang, Sprache, Stok, und alles kündigte einen ausserordentlichen Mann an. Auch in seinen Schriften hielt er eine gewisse Nachlässigkeit für anständiger, als eine gesuchte Delikatesse. Er kürzte seine Perioden auf die seltsamste Art ab, nahm veraltete und vulgare Wörter an, und apostrophirte die Hälfte der Vokalen, welches für die so vokalenarme deutsche Sprache eben kein Freundschaftsdienst war. Seitdem er sich aber auch seine Waden und Backen apostrophirt hat, ist er in allen Sachen geschmeidiger und gelassener geworden.—Seine Schriften enthalten sehr viele von den glücklichen Zügen, die eine richtige Menschenkenntniss mit einer starken und reichen Phantasie und einer piquanten Laune vereinbaren. In allen sieht man auch, dass er einen Plan anlegen und übersehen kann, und Herr von den Mitteln ist, ihn auszuführen, wodurch er sich von allen seinen Nachahmern auffallend unterscheidet. Wenn irgendwo ein Theil nicht sehr genau mit dem Ganzen zusammenhängt, so sieht man, dass es nicht aus Ungeschicklichkeit geschah, sondern er sich nur die Mühe nicht nehmen wollte, denselben besser anzuknüpfen. Er hat viel Studium, ist ein Kenner der alten und bekanntesten neuen Sprachen, zeichnet, ist Musikant, ein guter Gesellschafter, Bonmotist und herzoglicher Legationsrath.

Ohne Zweifel sieht er jezt selbst ein, dass er der deutschen Literatur viel geschadet hat. Viele junge Leute glaubten, es wäre bloss um Dreistigkeit, Unverschämtheit, Verunstaltung der Sprache und Vernachlässigung alles dessen, was Ordnung und Wohlstand heisst, zu thun, um Genies zu werden. Sie behaupteten öffentlich, dass alles Studiren, alle Regel und aller Wohlstand Unsinn, und alles, was natürlich ist, schön wäre, dass ein wahres Genie keine Bildung nöthig hätte, sondern, wie Gott, alles aus seinem Wesen schöpfen, und sich selbst genug seyn müsste, dass ein Genie berechtigt wäre, sich im blossen Hemd, oder auch nach Belieben in puris naturalibus, an dem offenen Markt und bey Hofe zu produziren, dass die kalte Vernunft die Menschen zu Schöpsen, eine umbezahlte Phantasie aber zu Halbgöttern machte; dass träumen, entzücktseyn und rasen der natürliche und glückliche Zustand des Menschen wäre, dass alle Beschäftigungen, wodurch der Mensch sein tägliches Brod verdiente, ihn unter seine Natur und Würde erniedrigten, dass in der besten Welt die Menschen auf allen vieren gehen, und Eicheln fressen müssen u.s.w. Du musst nicht glauben, ich übertreibe. Ich kann dir das alles urkundlich vor Augen legen. Göthe hatte das mit Rousseau gemein, dass seine Philosophie (auf falschen oder wahren) Grundsätzen beruhte, der Liederlichkeit und Ausgelassenheit schmei-

chelte, und deswegen von Leuten ausgeübt ward, die gar keine Grundsätze hatten, sondern durch blinden Glauben an ihren Propheten selig werden wollten. Seine Jünger begiengen die lächerlichsten Ausschweifungen, indessen er immer seiner selbst Meister war, und das Eigensinnige seines Betragens durch eine Übereinstimmung desselben mit seinen Grundsätzen, durch eine gewisse Mässigung, und durch eine Umgänglichkeit mit allen Menschen rechtfertigte. Nun erschien ein Schwall von dem elendesten Geschmiere, das je die Welt gesehen. Ich glaube, viele dieser Herren wären selbst nicht im Stand, von manchen Stellen ihres Geschreibsels eine Erklärung zu geben. Der platteste Unsinn ward von Kritikern dieser Parthey als die Quintessenz des menschlichen Witzes und der menschlichen Phantasie (dem menschlichen Verstand kündigten sie, wie ich dir oben sagte, öffentlich und ausdrücklich den Krieg an) ausgeschrieen. Wenn man den Beyfall des Publikums, im Grossen genommen, will verachten lernen, so muss man die Produkte mancher dieser Herren lesen, die zum Theil noch jezt für Wunder gehalten werden. Diese Kalmückenhorde rekrutirte unter allen Klassen Künstler. Es gab Ärzte, die ihr System nach den Glaubensartikeln dieser Schwärmersekte einrichteten, und lehrten, sich im Schnee wälzen, im kältesten Wasser baden, Bockssprünge machen, sich auf den Kopf stellen, abstürzige Felsen erklettern, nichts warmes zu sich nehmen, sondern bloss von den rohen Früchten der Erde leben, der Natur nicht den geringsten Zwang anthun, sondern sich der Naturlast stehenden Fusses an jedem Ort und zu jeder Zeit entbürden, u. dgl. m. wäre alles, was der Mensch sowohl zur Erhaltung als zur Wiederherstellung seiner Gesundheit thun könnte. Ein bekannter Doktor, welcher verschiedene Leute durch diese Kur zu Grunde gerichtet, berief sich in seinen Vorschriften bloss auf das Beyspiel der grossen Geister Deutschlands. Wenn er einem Kranken das kälteste Bad verordnete, und dieser aus Erfahrung befürchtete, er möchte ein Fieber oder einen Fluss holen, so versicherte ihn der Herr Doktor, er habe nichts von allem dem zu befürchten, denn der grosse Göthe gieng mitten im Winter ins Wasser und ins Eis.—Die jungen Mahler mahlten nichts mehr, als Stürme, Blitze und Alpengebirge; Elephanten, Löwen und Tiger; Didonen auf den Scheiterhaufen; Lukretien und Medeen, die ihre Kinder zerrissen. Alle sanftern Landschaften, die alltäglichen Thiere und die gewöhnlichen Situationen der Menschen schloss jeder aus seinem verschiedenen Fach aus. Um Zeichnung, Haltung und Wahrheit war es ihnen nicht zu thun. Diese Kleinigkeiten überliesse ein Genie, sagten sie, den kalten Vernunftmenschen und Brodarbeitern. Die Kunst bestand nach ihren Begriffen darin, dass alles, was sie machten, ausserordentlich wäre. Je unnatürlicher eine Dido die Arme zerränge, je gewaltsamer sie die Augen verdrehte, und je mehr Unordnung im Haar und in der Draperie herrschte, desto schöner wäre sie.—Auf diese Art missbrauchten Künstler jeder Gattung Göthes Theorie. Seine Anhänger ahmten ihm auf die lächerlichste Art in der Kleidung, im Gange, und sogar im Reden nach.

Ganz unschuldig ist er nicht an diesen Ausschweifungen. Er entdeckte bey einigen seiner Freunde, z.B. Lenz, Klinger und andern, Funken von wahren Genie, die durch einige Aufmunterung in lichte Flammen zu bringen wären. Da er aber einmal angefangen hatte, den

Protektor zu machen, so drängten sich auch Leute an ihn zu, die seiner Protektion ganz unwürdig waren, und die er geraden Weges wieder zu ihren Brüdern auf die Weide hätte zurückweisen sollen. Der Kitzel des Ruhms mochte ihm aber vielleicht nicht missbehagt haben, und er schämte sich nicht, wenigstens einige Zeit lang wirklich an der Spitze der Rotte zu stehen. Rousseau war hierin sehr verschieden von ihm. Der protegirte nicht und kommandirte nicht.—Jetzt scheint sich Göthe um das Litteraturwesen überhaupt wenig mehr zu bekümmern. Er arbeitet an einer Lebensbeschreibung des berühmten Bernards von Weimar und geniesst das Leben in so weit es sich mit ziemlich welken Lenden geniessen lässt. Er wird, wie man mir in Weimar sagte, von allen Seiten her, unablässig mit Rekommandationen bestürmt, und aus Osten, Westen, Süden und Norden besuchen ihn zu Zeiten Jünger seiner Apostel, in der Hoffnung, angebracht zu werden. Er hat es sich aber jetzt zur Regel gemacht, mit seiner Protektion haushälterisch zu seyn; und da thut er wohl daran. Die Sottisen dieser Leute würden alle auf ihn fallen. Es ist auch keine Folge, dass, wenn die Minister, Räthe und Kabinettssekretäre eines Hofes schöne Geister sind, auch die Küchen- und Kellermeister, Kammerdiener, Laquayen, Jäger, und endlich auch die Stallknechte schöne Geister seyn müssen.

V

It has been the aim in this paper to show :

1. That only rarely do contemporary writers go into detail with regard to the origin of the term "Sturm und Drang," which to them is the standard designation for the period.

2. That in the earlier writers—Koberstein, Gervinus, and Vilmar—the term "Sturm und Drang," altho occurring occasionally, is rather rare, while other designations, such as "Originalgenie" and "Kraftgenie," are much more frequent.

3. That "Sturm und Drang" does not become the fixed, standard phrase before Scherer.

4. That in his *Wörterbuch* article on "Genie," Rudolf Hildebrand fails to find a single clear use of the term "Sturm und Drang" (as a designation for the literary movement) before Tieck's preface to the edition of Lenz (1828).

5. That even before he met Kaufmann, Klinger had a predilection for the two words "Sturm" and "Drang" and hence was well prepared to accept the new title for his play suggested by Kaufmann.

6. That, contrary to Hildebrand's belief, the term "Sturm und Drang" was in use even in the eighteenth century,—as a slogan as early as 1777, and as a set phrase in 1784 by Knigge,

in 1793 by Iffland, in 1803 by A. W. Schlegel, in 1819 by Bouterwek, and in 1827 by Koberstein.

7. That hence the phrase must have been perfectly well known in the eighteenth century, but was not widely used.

8. That it was not more widely used, perhaps, because other designations, such as "Genieperiode" and "Kraftgenies," containing more of a satirical sting, were better suited to the prevailingly satirical attitude of the time toward the movement.

9. That Goethe too was familiar with the term but perhaps had an aversion to it.

10. That Klinger himself and others (to some extent even Lenz) soon turned away from the movement and ridiculed it, or at least took a detached view of it.

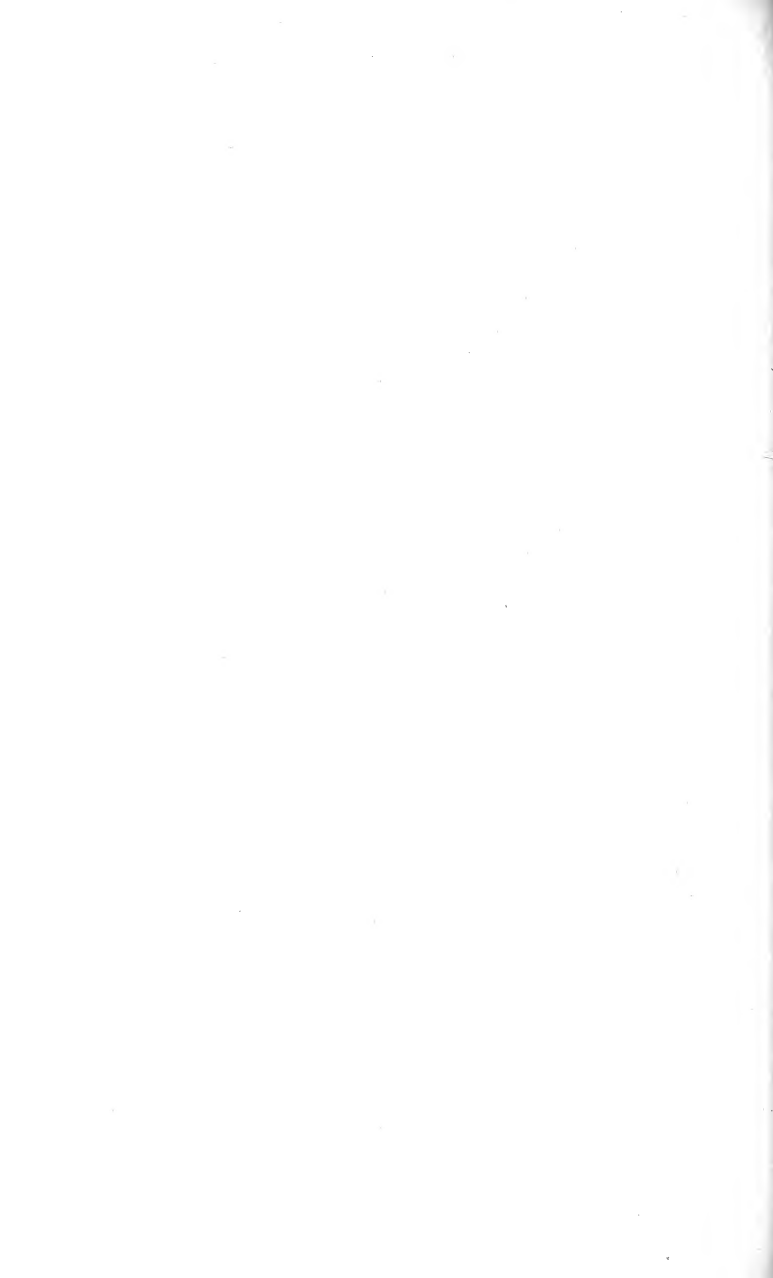
11. That as a living force the movement hardly survived the year 1782.

12. That the satirical connotation of "Genie," "Original," "Kraft," etc., gained currency very rapidly in the seventies of the eighteenth century, and became a literary fashion, actually endangering the future existence of the words "Genie" and "Original" in the German language. Thus these words crowded out the other familiar term, "Sturm und Drang." This too may help explain the fact that "Sturm und Drang" occurs so rarely in literature before 1827. After this, when the satirical attitude toward the movement gradually died out, "Sturm und Drang" as a designation finally began to come into its own.

Many passages are quoted from numerous authors to support these points and to throw light upon the attitude of the time. Other miscellaneous references in the literature of the period, finally, are added.

Study No. 72

THE TRANSFORMATION OF BOTTOM. By JOHN ROBERT
MOORE, Ph.D., Associate Professor of English, Indiana
University.



The Transformation of Bottom

By JOHN ROBERT MOORE, Associate Professor of English
in Indiana University

FOR students of *A Midsummer Night's Dream* who remain unsatisfied with such explanations as Schlegel's, that "the droll wonder of Bottom's transformation is merely the translation of a metaphor in its literal sense," it is customary to seek out analogues for the weaver's experience in the literature and oral tradition of magic and witchcraft. In the present paper it is my purpose to show that altho the widely accepted doctrine of the possible transformation of man into the likeness of an ass was no doubt familiar to Shakespeare,¹ as well as to his audience, the actual performance of the feat in *A Midsummer Night's Dream* owes much to the stage conventions of the later moralities and interludes.

Many of the stories or instructions concerning magical practice which have been cited as possible source-material for the play have no direct relation to the transformation of Bottom, except in so far as they attest a widespread popular curiosity in occult matters of the sort. The hero of Apuleius was not crowned with an ass's head, but was entirely transformed; and the change was not effected without his knowledge by an unseen spirit, but was due to his own unlucky use of the wrong ointment, as he was in the act of attempting to assume the likeness of a bird. The young Englishman in the kingdom of Cyprus, whose story is retold from Bodin by Reginald Scot (*The Discoverie of Witchcraft*, 1584, Book V, chap. iii), was at first unconscious of his transformation by the witch, but he soon discovered his misfortune. He, too, was completely changed into the physical likeness of an ass, so perfectly that during the three years of his servitude only the witches were able to recognize him as a man. Scot him-

¹ Frank Sidgwick remarks, in his discussion of the folk-lore of transformations, that "almost while writing these words I receive first-hand evidence that such a tradition is not yet extinct in Welford-on-Avon, a village, four miles from Stratford, with which Shakespeare must have been perfectly familiar." *The Sources and Analogues of "A Midsummer-Night's Dream,"* New York and London, 1908, p. 31.

self analyzes some of the contradictions of the story, in a passage which Nicholson has regarded (*Notes and Queries*, 6th Series, IV, 2) as perhaps the original suggestion for Bottom's fondness for hay:

The bodie of man is subject to divers kinds of agues, sicknesses, and infirmities, whereunto an asses bodie is not inclined: and mans bodie must be fed with bread, &c.: and not with hay. *Bodins* asseheaded man must either eate haie, or nothing: as appeareth in the storie.²

Scot's recipe for setting "an horsse or an asses head upon a mans shoulders," which was first pointed out by Douce as the original source for Shakespeare, is still further afield. For present purposes, there is no significance in all of the elaborate preparation, unless it be taken merely as an additional proof of the contemporary belief in the possibility of such a performance:

Cut off the head of a horsse or an asse (before they be dead) otherwise the vertue or strength thereof will be the lesse effectuall, and make an earthen vessell of fit capacitie to containe the same; and let it be filled with the oile and fat thereof; cover it close, and dawbe it over with lome: let it boile over a soft fier three daies continuallie, that the flesh boiled may run into oile, so that the bare bones may be seene: beate the haire into powder, and mingle the same with the oile; and annoint the heads of the standers by, and they shall seeme to have horssees or asses heads. If beasts heads be annointed with the like oile made of a mans head, they shall seeme to have mens faces, as diverse authors soberlie affirme.³

Much simpler than this elaborate system is the one given by Albertus Magnus, *De Secretis Naturae*. Perhaps of all the analogues from the lore of witchcraft and magic, the account of a transformation performed by Dr. Faustus is closest to the spirit of *A Midsummer Night's Dream*, assigning the feat, as it does, to the whimsical prank of a magician, who entertains his subjects with revelry until the time of their enchantment has expired:

In this. and such pastime they passed away the whole day; when night being come Dr. Faustus bid them all to supper, which they lightly agreed unto, for students in these cases are easily intreated; wherefore he promised to feast them with a banquet of fowl, and afterwards they would all go about with a mask. . . . Dr. Faustus commanded every one to put on a clean shirt over the other cloaths: which being done, they looked one upon another; it seemed to each one of them that

² Reginald Scot, *The Discoverie of Witchcraft*, Nicholson reprint, London, 1886, p. 99.

³ *Ibid.*, p. 315.

they had no heads; and so they went forth unto certain of their neighbours, at which sight the people were most wonderfully afraid, and as the use of Germany is, that wheresoever a mask entreth, the good man of the house must feast them; so as these maskers were set to their banquet, they seemed again in their former shape with heads, insomuch, that they were all known who they were; and having sat, and well eat and drank, Dr. Faustus made that every one had an ass's head on, with great and long ears, so they fell to dancing and to drive away the time until it was midnight, and then everyone departed home, and as soon as they were out of the house, each one was in his natural shape, and so they ended and went to sleep.⁴

But even here the differences are great: the students were not unwilling or apparently unconscious victims of the magician, but were so much pleased with this and the rest of "Faustus's jesting tricks" that

Dr. Faustus was invited unto the students that were with him the day before, where they had prepared an excellent banquet for him. . . . Dr. Faustus asked leave to depart, but they would in no wise agree to let him go, except that he would promise to come again presently.⁵

In all of these analogues it will be observed that two essential features of the transformation of Bottom are never found: the hero does not remain the unwitting victim of a trick, and he is not led to expose himself still further by the seductions of feminine beauty.

Both of these elements are fairly well represented in the moralities and interludes, where it sometimes happens that the hero is lulled to sleep (usually by singing) in the midst of a company of beautiful women; and that while he is still in slumber, or is otherwise under their influence, he is subjected to gross indignities, or is even transformed by means of a false head.

Something of this sort is implied by a stage direction in *Ane Satyre of The Three Estaitis*:

*Heir sall the Ladies sing ane sang, the King sall ly down among the Ladies, and then Veritie sall enter.*⁶

In *The Marriage of Wit and Science* Idleness sings Wit to sleep in her lap, and then causes her son Ignorance to exchange garments with him. On awaking thus metamorphosed, Wit has great difficulty in establishing his own

⁴ *The History of the Damnable Life and Deserved Death of Dr. John Faustus*, chap. xliii, *Early English Prose Romances*, ed. William J. Thoms, 2d ed., London, 1858, Vol. III.

⁵ *Ibid.*, chap. xliv.

⁶ *The Poetical Works of Sir David Lyndsay*, ed. by David Laing, Edinburgh, 1879, II, 58.

identity.⁷ In *The Cobler's Prophecy* Mars is lulled to sleep by the singing of Venus, who then leaves Folly to make music for her abused lover while she runs away with Contempt.⁸ In *The Marriage of Wit and Wisdom* a partial transformation is called for by one stage direction:

Here shall Wantonis sing this song to the tune of "Attend the goe playe the;" and having sung him a sleepe vpon her lappe, let him snort; then let her set a fooles bable on his hed, and colling his face: and Idlenis shall steale away his purse from him, and goe his wayes.⁹

This last corresponds closely with some features of a lost play, *The Cradle of Security*, as it was described in 1639 by a man of seventy-five years who had seen it in his boyhood:

The play was called *The Cradle of Security*, wherein was personated a king or some great prince, with his courtiers of several kinds, among which three ladies were in special grace with him; and they keeping him in delights and pleasures, drew him from his graver counsellors, hearing of sermons, and listening to good counsell and admonitions, that in the end they got him to lye down in a cradle upon the stage, where these three ladies joyning in a sweet song, rocked him asleepe, that he snorted againe; and in the mean time closely conveyed under the cloaths wherewithall he was covered, a vizard, like a swines snout, upon his face, with three wire chains fastened thereunto, the other end whereof being holden severally by those three ladies; who fall to singing againe, and then discovered his face that the spectators might see how they had transformed him, going on with their singing.¹⁰

It is clear that the vizard, "like a swine's snout," was a theatrical property of great importance in the play, so much so that it was distinctly remembered by Mr. Willis after a lapse of more than sixty years.

In *A Midsummer Night's Dream* some such property head is certainly implied in the Folio direction:

Enter Píramus with the Asse head.

This direction, omitted by the Quartos, was tamely changed by Rowe and Pope to "an Ass Head." To Furness, the explicit reference of the Folio was a proof that the Folio edition was printed directly from the prompter's copy of the play:

In all modern editions this is of course changed to 'an Ass's head,' but the prompter of Shakespeare's stage, knowing well enough that

⁷ *The Marriage of Wit and Science*, Hazlitt-Dodsley, II, 374ff.

⁸ *The Cobler's Prophecy*, ed. by A. C. Wood and W. W. Greg. *Malone Society*, 1914, II, 993ff.

⁹ *The Marriage of Wit and Wisdom, An Ancient Interlude...* ed. by J. O. Halliwell, *Shakespeare Society*, London, 1846, pp. 20-21.

¹⁰ Quoted from *Mount Tabor, or Private Exercises of a Penitent Sinner*, 1639, by R. W. [R. Willis], in the *Boswell-Malone Shakespeare*, London, 1821, III, 29.

there was among the scanty properties but one Ass-head, inserted in the text 'with the Asse head'—the only one they had.¹¹

I cannot but think that this trifling expression stamps this stage-direction as taken from a play-house copy.¹²

Whether or not Collier and his successors have been right in conjecturing that the play in question was *A Midsummer Night's Dream*, it is evident that a theatrical property ass-head was a principal feature of the sacrilege committed by a Mr. Wilson who was censured by the Commissary General, John Spencer, for enacting "a play or Tragidie"—elsewhere called a comedy—at the house of John Williams, bishop of Lincoln, on Sunday, September 27, 1631:

Likewise wee doe order that Mr. Wilson because hee was a speciall plotter and Contriver of this busines and did in such a brutishe Maner act the same with an Asses head, therefore hee shall vpon Tuisday next from 6 of the Clocke in the Morning till sixe of the Clocke at night sitt in the Porters Lodge at my Lord Bishopps house with his feete in the stockes and Attyred with his Asse head and a bottle of haye sett before him and this superscripcion on his breast:

Good people I have played the beast

And brought ill things to passe

I was a man, but thus have made

Myselfe a Silly Asse.¹³

But militant Puritanism was hardly more unfavorable to the presentation of Bottom's enchantment than was the spirit of the court. With the development of the masques and, later, of post-Restoration splendor in the presentation of Shakespeare, all sense of mystery in the enchantment of mortals was at an end. Man-monkeys could come down freely from the trees to enter into the dance, and the physiognomy of an actor could be falsified at will for the sake of a bizarre effect. It is curious to note that Pepys, who had nothing to say in favor of *A Midsummer Night's Dream*, was immensely fond of the unimaginative extravaganzas which supplanted it.

It may be reasonably supposed that *A Midsummer Night's Dream* owes something to the popular moralities for its use of a property false-head as an efficient substitute for the elaborate preparations so requisite in authentic witchcraft; and that the encounter of Bottom with the ladies of the fairy court is akin to the frequent experiences of the morality

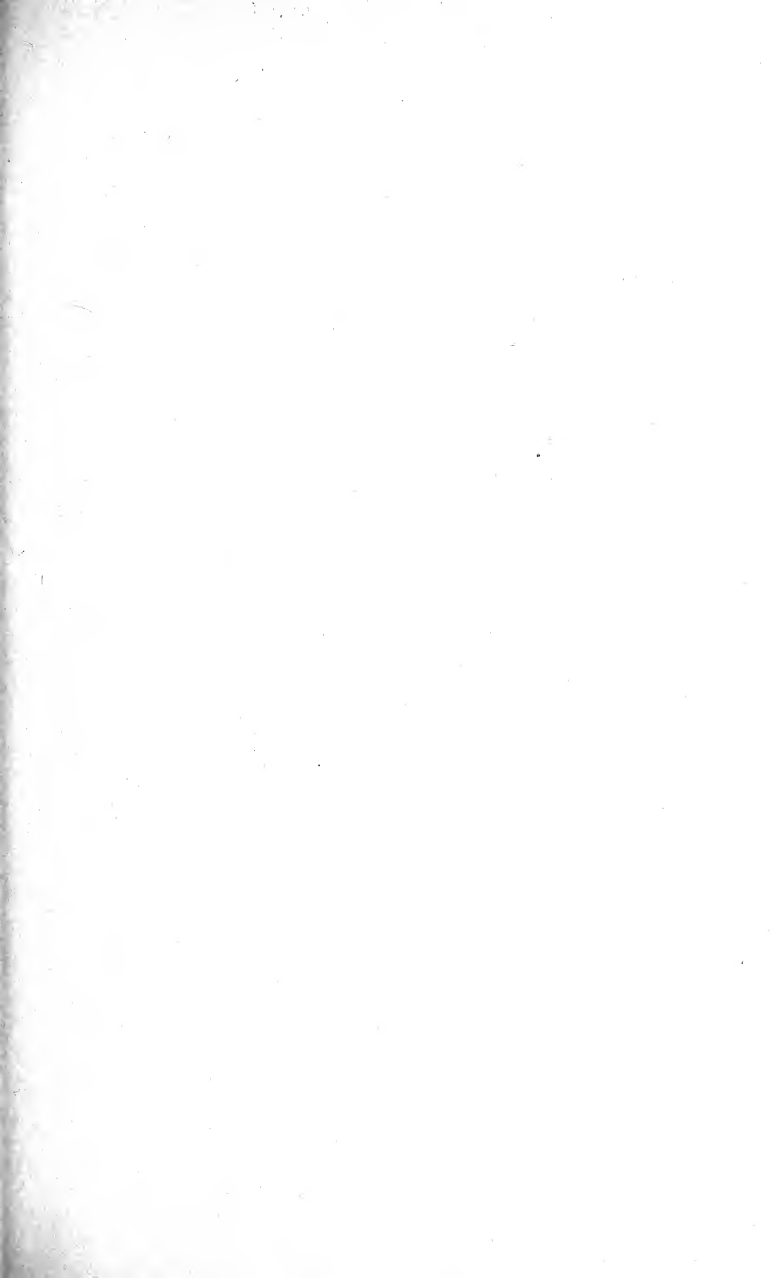
¹¹ *A Midsummer Night's Dream* (New Variorum Edition), Preface, xv.

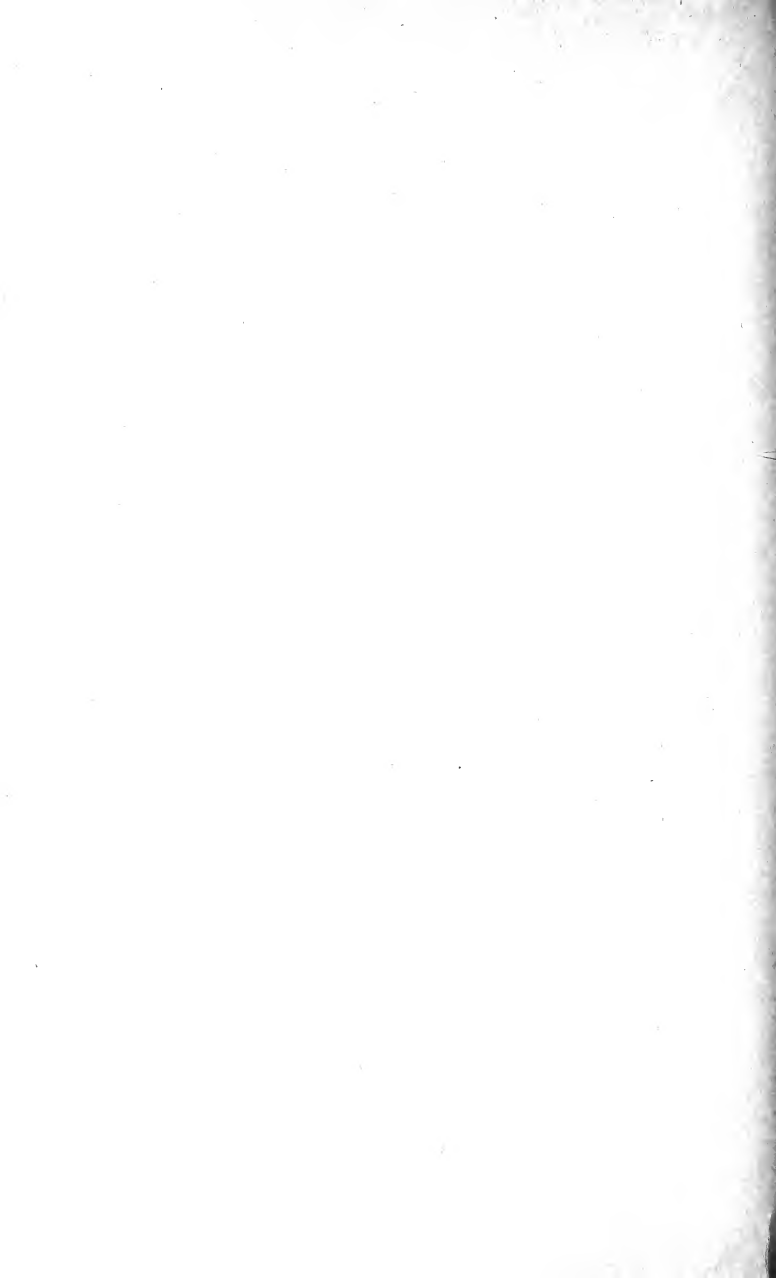
¹² *Ibid.*, note on III, i, 116.

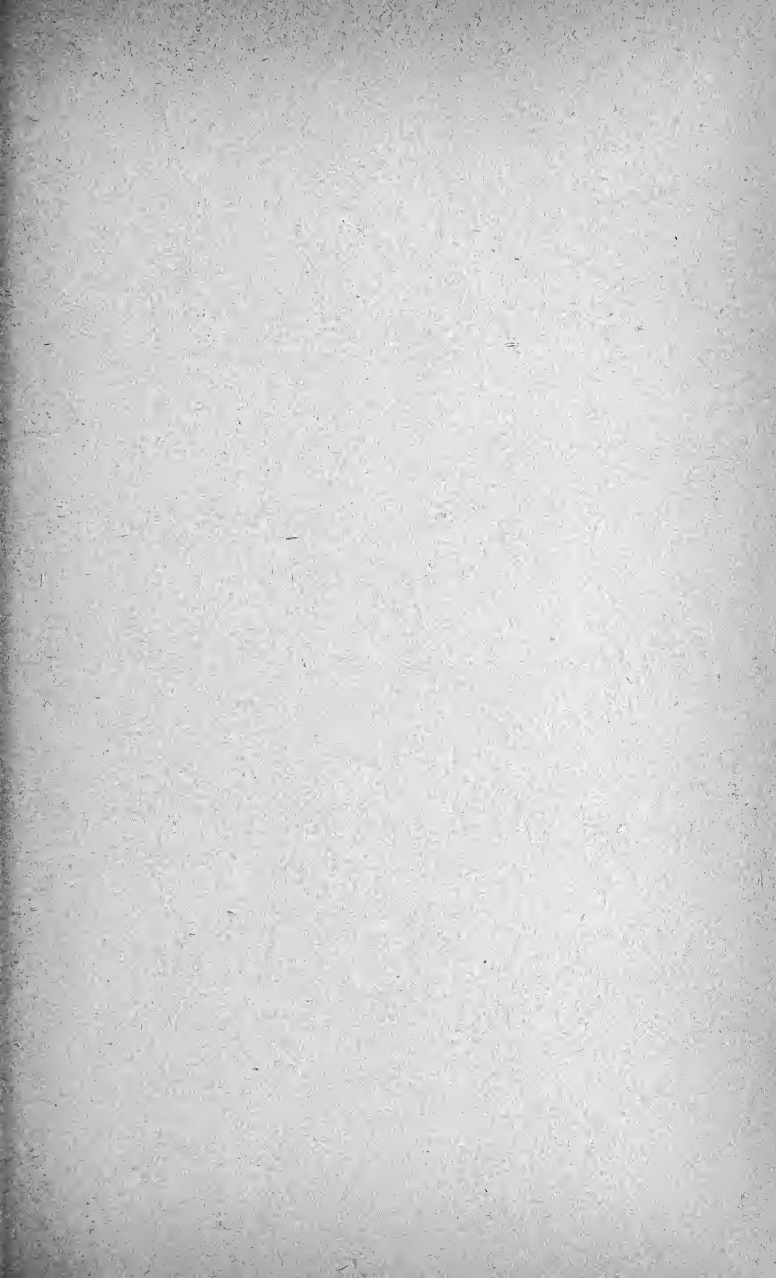
¹³ *Lambeth Ms. 1030*, art. 5, p. 3, as given in *The Shakespeare Allusion-Book*, London and New York, 1909, I, 352.

heroes in the seductive company of beguiling women. Shakespeare has varied the theme greatly by his replacement of the Vices with fairies: Puck's motive is not theft, or moral injury to Bottom, but fun; and Titania is not a temptress, but an unwitting partner in the hero's enchantment. The extravagant speeches of the attendant fairies in Titania's bower are not intended as conscious mockery of the hero, as are the song and dance of *The Cobbler's Prophecy*; the music played for Bottom is not meant to stupefy him or to lull his moral sensibilities, but is the honest "*Musicke Tongs, Rurall Musicke*" for which he has expressed a preference; and afterwards the awakened weaver, in his stolid inability to comprehend what has befallen him, or to believe that his strange adventure can have been more than a dream, becomes more British and more profound than any of his predecessors.

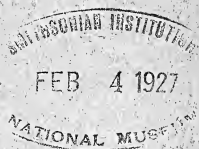
But *A Midsummer Night's Dream* seems, in each of these passages, distinctly reminiscent of the earlier treatment of metamorphosis in the moralities. It is likely enough that the "tedious brief scene" of Pyramus and Thisbe was not the only episode in Shakespeare's comedy which was recognized by the Elizabethan audience as presenting, at least in part, a travesty of the plays of lesser dramatists.







INDIANA UNIVERSITY STUDIES



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COMPARATIVE MORPHOLOGY OF THE ORIENTAL MAYDEAE

By PAUL WEATHERWAX

Associate Professor of Botany, Indiana University

THE widespread interest that has been shown for many years in the origin and botanical nature of maize attaches an unusual interest to all grasses thought to be at all closely related to this unique plant. Its close relationship to *Tripsacum* and *Euchlaena*, of the American tropics, is generally conceded; but four other genera, of the Eastern Hemisphere, which systematists have usually placed in the same tribe with *Zea*, have never been studied in sufficient detail to afford any substantial foundation for their taxonomic position.

Bentham and Hooker (2) include *Zea*, *Euchlaena*, *Tripsacum*, *Coix*, *Polytoca*, *Sclerachne*, *Chionachne*, and *Pariana* under the tribe Maydeae. Hackel (3) adopts the same classification except for *Pariana*, which is placed with the Hordeae. Baillon (1) treats *Pariana* as a monoecious form of the Hordeae, and the other seven genera as a hardly separable subdivision (Maydeae) of the Andropogoneae. More recent writers have generally omitted *Pariana* from the Maydeae; and some have substituted the tribal name Tripsaceae for Maydeae.

Representative species of the genera not native of America have been under observation by the writer for several years; and, altho the data collected thus far are far from complete, they are given here for the use of other investigators—especially those interested in maize—who may not have been able to examine the plants, or to secure detailed, significant descriptions. Seeds and herbarium specimens of *Polytoca*, *Sclerachne*, and many varieties of *Coix* have been secured from their native habitats, and several generations of these plants have been grown in the greenhouse. Only herbarium specimens of *Chionachne* have been available. It is intended here to describe only the general anatomy of the plants, in comparison with what is known about maize, and to discuss

briefly the probable relationships. More detailed studies will probably be undertaken later.

Coix

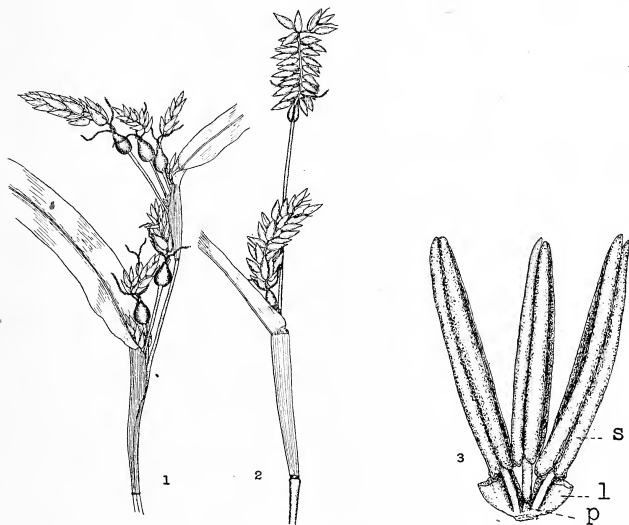
We are greatly indebted to Sir George Watt for bringing together, in 1904, the available information about Coix (5). He gives a résumé of the accounts of the plant in old works on medicine, horticulture, and natural history back to the time of Pliny, together with information obtained from questionnaires sent out to all parts of India where Coix was found.

The genus occurs wild in southern and eastern Asia and in the islands of the Pacific, and cultivated or as an escape from cultivation thruout all tropic and warm regions of the world. Three more or less distinct species have been described: *C. Lachryma-Jobi* L., *C. gigantea* Koen., and *C. aquatica* Roxb. Examination of a large number of specimens from many localities, however, shows so many intergradations and so little consistent correlation of diagnostic characteristics that, in a morphological consideration, the genus may as well be treated as a monotype, which is, indeed, the disposal that is made of it by many taxonomists.

Plants that I have been able to grow in the field and in the greenhouse have embodied the principal significant characteristics of the genus as indicated in the taxonomic descriptions. The plant ordinarily has an upright stem one to eight feet in height, and some varieties are much taller in the tropics. One Indian variety is said to be a floating aquatic weed, sometimes reaching the length of 100 feet (5). The primary stem branches freely from the base, and branches may arise from practically any cauline node. As the time for flowering approaches, the ultimate branches appear, often in dense fascicles in the axils of the upper leaves (Figs. 1 and 2). The pith of the stem is solid, as in other species of the Maydeae and Andropogoneae.

The leaves are usually glabrous or slightly roughened on the upper surface, but those of some varieties bear on their sheaths and blades short, unicellular hairs, which spring from a peculiar gland-like base (5). Sometimes vegetative parts of the plant are covered with a white, waxy "bloom," which is usually associated with a penetrating odor much like that of tobacco.

Most varieties are annual, the plant dying soon after seed production, but some are perennial. In the greenhouse some of the perennial varieties regularly produce two crops of flowers and seeds each year, flowering in March and September. No rhizomes or other underground organs of food storage are produced, and continuity of propagation in the perennial forms is secured by basal suckers. It is doubtful if the plants could undergo any considerable period of dormancy due to either cold or drought.



Figs. 1 and 2. Inflorescences of two types of *Coix*.

Fig. 3. A staminate flower of *Coix*. s, stamen; l, lodicule; p, pistillodium (rudimentary pistil).

Inflorescence.—The most striking feature of the plant is the hard shell covering the female spikelet and caryopsis (Figs. 1, 2, and 4-11). As will be shown in detail later, this consists of a single greatly modified leaf sheath, whose peculiar conical or pyriform shape and glistening appearance long ago gave to the widely distributed form of the plant the common name "Job's Tears," by which it is known all over the world and in many languages.

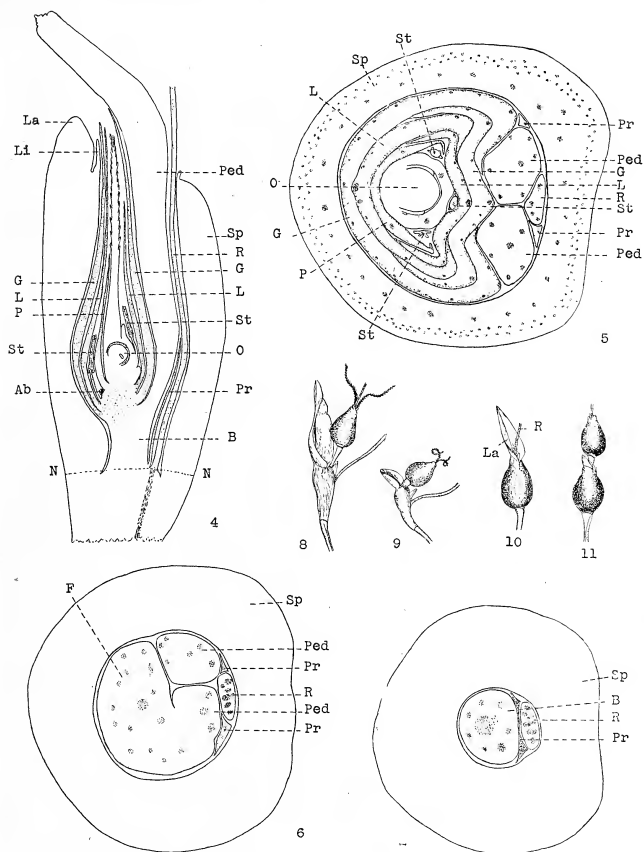
The spikelets are arranged in a panicle, whose primary branches are so reduced in structure that the whole inflorescence appears to be a spike-like raceme. On the lower part of the rachis is usually a single pistillate spikelet, enclosed, with some other structures, in the spathe mentioned above. Above this, alternately arranged in pairs or groups of three, are thirty to a hundred staminate spikelets, each group consisting of sessile and pedicelled members (Figs. 1, 2). Rarely there may be as many as two or three pistillate spikelets in a row at the base of the inflorescence (Figs. 11, 15).

The staminate spikelets are borne close together in a compact group, whose peduncle varies in length and thickness. The whole structure may be erect or nodding. The spikelets are usually erect on the rachis, but in some varieties (Fig. 2) they are definitely reflexed at maturity. The staminate spikelet and its flowers are the same as those of maize in significant structure (Fig. 3).

The spathe surrounding the pistillate spikelet subtends and encloses an axillary group which is of great interest (Figs. 4-7). This is really a short branch on which the pistillate spikelet is apparently terminal. Below this spikelet are two sterile pedicels attached at different levels, and doubtless at different nodes, and finally a prophyllum (Fig. 4).^{*} The sterile pedicels are doubtless the homologues of two spikelets of the staminate groups of three. This observed structure is exactly in accord with the generally accepted interpretation of the groups of two or three spikelets which occur regularly thruout the Maydeae and Andropogoneae. It is interesting to note that here, inside a highly specialized enveloping organ, where we should expect to find extreme reduction of parts, there should occur, as a homologue of the group of three staminate spikelets, a branch so little reduced in structure as to show its prophyllum and its three spikelets apparently attached at different nodes.

The prophyllum is unequally divided into two lobes at the top, and its two nerves are unequal in size. The two sterile pedicels are large and inflated or filled with a loose parenchyma. Rudimentary bracts or floral organs often develop at their tips.

^{*} In one variety examined since this paper was written, two small rudiments seem to occur regularly on this axis above the prophyllum. It seems reasonable that these are the bracts subtending the two sterile pedicels.



Figs. 4-11. The pistillate spikelet and spathe of *Coix*. Fig. 4. Longitudinal section. Figs. 5-7. Transverse sections at different levels. Figs. 8, 9. Leaf sheaths more or less indurated. Fig. 11. Two pistillate spikelets at the base of an inflorescence. La, lamina, and Li, ligule of spathe; G, glume; L, lemma; P, palea; St, staminodium (rudimentary stamen); Ab, aborted flower; N, node at which the pistillate branch is borne, and at which the rachis disarticulates at maturity; Ped, sterile pedicel; Sp, spathe; R, rachis of inflorescence; O, ovule; Pr, prophyllum; B, base of pistillate branch.



Figs. 12 and 13. Inflorescences of *Coix* with staminate portions lacking or greatly reduced.

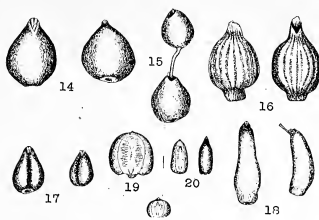
The pistillate spikelet (Figs. 4-7) has the same parts as that of maize except that the palea of the aborted flower is lacking. The staminodia usually develop a little farther than those of maize before disorganization begins. The glumes and lemmas are thick and succulent and not at all indurated. When mature and dry they are thin and delicate.

The upper (adaxial) flower of a sessile spikelet of a staminate group sometimes develops a functional pistil and sets a seed. This anomaly often occurs in several flowers of the inflorescence, especially late in the fall or when the plants are partly shaded during development.

All varieties of the plant that have been observed seem to show a marked sexual sensitiveness toward the intensity of illumination. Varieties producing fifty or more staminate to one pistillate spikelet in full summer sunlight may reduce the ratio to two or three staminate to one pistillate in the greenhouse even in summer, and become completely female in the greenhouse in winter (Figs. 12, 13).

Fruit.—The characteristic structure of the plant is the fruit, which, in a broad sense, consists of the spathe and all parts included within it at maturity. It varies greatly in size, shape, color, and texture (Figs. 14-18): In some varieties it is short and globular; in others it is long and almost cylindrical, or sometimes curved. It may vary from an eighth of an inch to half an inch in length, in the globular forms, and the cylindrical forms may be much longer.

The outside of the spathe is usually hard and shining, but in some of the cultivated varieties the whole structure is thin and husk-like or striated with indurated ridges. The hard-shelled types are said to change to soft-shelled types when



Figs. 14-18. Fruits of *Coix*. Fig. 14. The type commonly used for beads. Fig. 16. A soft shelled variety (*Ma-yuen*) used as a cereal. Fig. 17. Fruits deeply grooved along one side. Fig. 18. Long, curved or cylindrical fruits of the variety *stenocarpa*.

Figs. 19-21. Caryopsis of *Coix*. Fig. 19. The cereal type shown in Figure 16. Fig. 20. Elongated caryopsis of the variety shown in Figure 18. Fig. 21. Small caryopsis from the relatively large fruit shown in Figure 15.

brought under cultivation (5, p. 194), a genetic change whose mechanism would make an interesting study. When for any reason fecundation fails to occur, the spathe soon ceases development and dies without becoming indurated and silicified. The resulting chalky-white blind fruit is readily distinguished from fully developed fruits.

Disarticulation of the fruit from the peduncle at maturity leaves a tiny opening thru the base of the spathe, connecting with the interior cavity, which is, of course, open also at the top. When this opening is large enough the fruits may be strung as beads, and this is the principal use of the hard-shelled varieties.

Two-seeded fruits are occasionally found, due to the occurrence of two pistillate spikelets within one spathe. In some such cases the upper spikelet may have a poorly developed spathe of its own, the whole being included in the spathe of the lower (6).

The caryopsis, or fruit proper, depends for its size and shape very largely upon the nature of the space in which it develops inside the spathe. It is usually oval or elongated, and deeply grooved over the embryo, along the side which is in contact with the rachis and sterile pedicels (Figs. 19-21). The reserve food in the endosperm is usually rich in starch, but in



Figs. 22-24. Fig. 22. Inflorescence of *Polytoea*. Fig. 23. Inflorescence of *Sclerachne*. Fig. 24. Inflorescence of *Chionachne*.

some varieties it resembles that of waxy maize (4), being rich in erythrodextrin. The caryopsis of the soft-shelled varieties is widely used as a cereal in the Orient (5, 8).

An occasional leaf sheath at the base of a fascicle of inflorescences may become hard and shining like the spathe, thus bearing out in a measure our conception of the homologies of the spathe (Figs. 8, 9).

Polytoea

The only accounts of *Polytoea* that have been available are the taxonomic descriptions of the genus; and, in so far as I am informed, no account of any greater detail than the descriptions of its three or four species has ever been published. I have had access to excellent herbarium material and to living plants of *Polytoea barbata* Stapf. grown from seeds received from India.

This plant is a tall, slender annual, much branched at the base. The cauline branches are short and chiefly limited to the function of flower-bearing. The nodes are densely bearded (Fig. 22), and the leaf blades and upper parts of the sheaths

are more or less thickly beset with stiff, sometimes papillose, hairs. The plant shows no tendency to be perennial.

The inflorescences are mostly clustered at the ends of long branches which arise from the axils of the uppermost leaves (Fig. 22). The inflorescence is a modified panicle, as in *Coix*; its lower half is enclosed in a loose, inflated spathe. There is some doubt as to the homology of this spathe with the indurated one of *Coix*. The basal spikelet is pistillate; above it are five to ten pairs of staminate spikelets (Fig. 25).

The pairing of the spikelets, while similar to that in other *Maydeae*, and in the *Andropogoneae*, presents a different appearance because of the union of the pedicel of one spikelet, for at least a part of its length, with the rachis. In most of the *Andropogoneae*, and in the American *Maydeae*, each phytomer bears its characteristic group of two or three spikelets at its lower end. But in *Polytoca* a disarticulated phytomer regularly bears at its lower end a sessile spikelet, and at or near its upper end, a short-pedicelled or sessile one, depending upon the extent of the fusion of the pedicel with

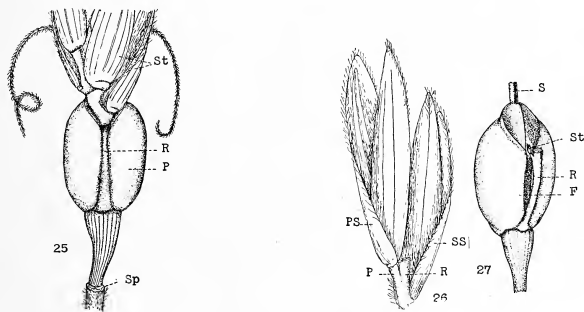
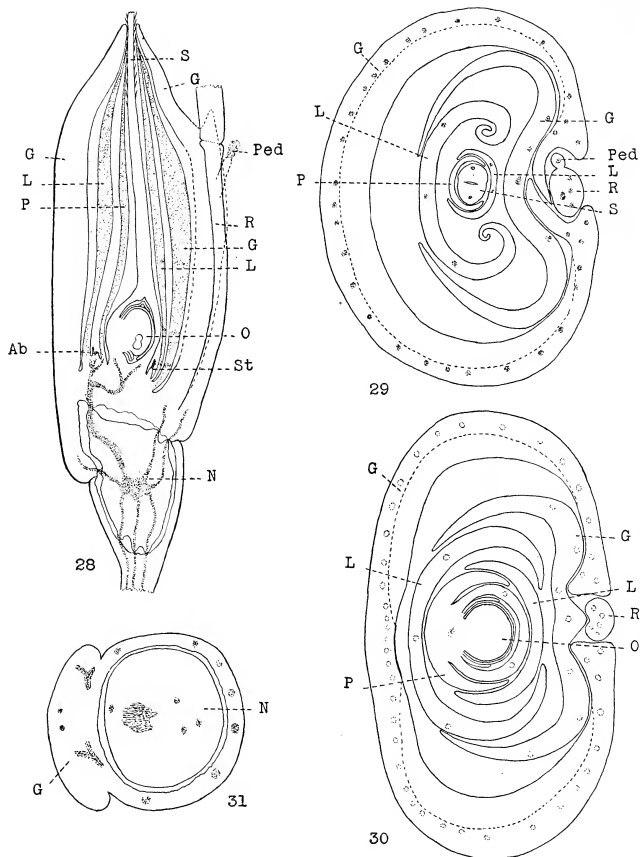


Fig. 25. Portion of inflorescence of *Polytoca*, with spathe removed. St, staminate spikelets; R, rachis of inflorescence; P, pistillate spikelet; Sp, node at which the spathe was attached.

Figs. 26 and 27. Pairing of spikelets in *Polytoca*. SS, sessile staminate spikelet; PS, pedicelled staminate spikelet, whose pedicel (P) is partly united with the rachis (R); F, pistillate spikelet; St, sterile pedicelled mate of the pistillate spikelet, the pedicel being united with the rachis; S, style.



Figs. 28-31. Fig. 28. Pistillate spikelet of *Polytocha* in longitudinal section. Figs. 29-31. Pistillate spikelets of *Polytocha* in transverse section. G, glume; L, lemma; P, palea; Ab, aborted flower; S, style; Ped, sterile pedicelled spikelet, or its pedicel; R, rachis, united with the pedicel in Fig. 30; O, ovule; St, staminodium; N, nodal parenchyma.

the rachis (Figs. 26, 27). The pedicelled mate of the female spikelet occurs as a rudiment near the top of the phytomer (Fig. 27).

The staminate spikelet is similar to that of *Coix*.

The pistillate spikelet is entirely surrounded by the lower glume, which becomes hard and shining at maturity and bears a deceptive resemblance to the spathe of *Coix*. At its top is a thickened ridge suggesting a ligule. The overlapping edges of this stony glume fit closely together and partly surround the rachis (Figs. 29, 30), forming a very efficient protective covering for the other parts of the spikelet and later for the seed. This glume remains soft and chalky-white if fertilization does not occur.

Except for this outer glume the pistillate spikelet is very similar to that of *Coix* (Figs. 28-31). The staminodia are more rudimentary than those of *Coix*; the styles are united for some distance at the base.

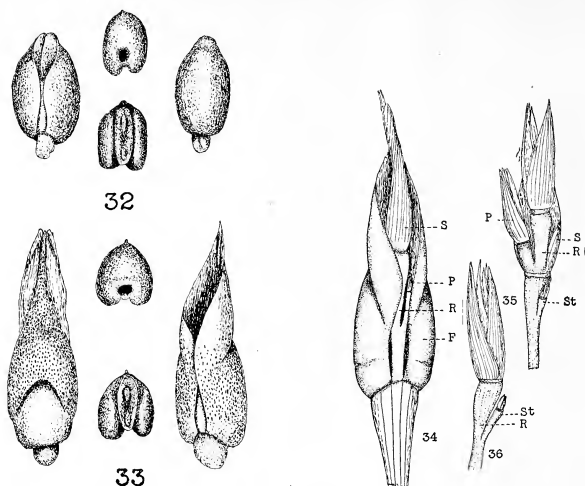
No perfect flowers, or flowers with reversed sexuality, have been observed in this plant, but there is a slight reduction in the ratio of male to female spikelets when plants are grown in reduced light.

In the node of the rachis at the base of the pistillate spikelet the pith presents a peculiar structure (Figs. 28, 31). At first completely filling the nodal cavity, it later splits loose from surrounding tissues and remains apparently suspended by the vascular strands which enter and anastomose within it. When the mature fruit breaks off at this node this body of nodal parenchyma is left protruding from the base of the outer glume (Fig. 32). The significance of this structure is not known, but, inasmuch as its size and shape vary with its water content, it may have some physiological rôle in the germination of the seed.

Sclerachne

The genus *Sclerachne* is represented by a single species, *S. punctata* R. Br., which occurs only in Java. Several generations of the plant have been grown in the greenhouse.

The descriptions and the specimens received from Java indicate that the plant is a more or less erect annual. Plants that I have grown tend more to a prostrate habit. Vegetatively this species resembles *Polytoca barbata*, but the latter



Figs. 32 and 33. Fig. 32. Dorsal and ventral views of the fruits of *Polytocha*. Fig. 33. Dorsal and ventral views of the fruits of *Sclerachne*. In each group the caryopsis is shown in the figures in the middle.

Figs. 34-36. Pairing of spikelets in *Sclerachne*. S, staminate spikelet; F, pistillate spikelet; R, rachis; St, sterile pedicel accompanying pistillate spikelet; P, pedicelled staminate spikelet; S, sessile staminate spikelet. The spikelet terminating the rachis is sessile, and its pedicelled mate is lacking.

is consistently taller and more slender. The leaves and stems are glabrous or somewhat ciliate.

The homologue of the spathe seen in *Polytocha* is here more of the nature of a foliage leaf. The spike bears one or two basal pistillate spikelets each, accompanied by a rudiment, and above these only one to three staminate spikelets (Fig. 23). Altho modified by the small number of staminate units, the arrangement of the spikelets is the same as in *Polytocha* (Figs. 34-36).

No significant peculiarity of the male or female spikelets has been noted, except that in the former the functional androecium is sometimes reduced to a single stamen. The ligule-like appendage at the top of the outer glume of the

pistillate spikelet is longer and thinner than in *Polytoca*. The middle portion of this glume has a conspicuous papillose, or almost tuberculate, roughening (Figs. 33, 34). The basal plug of parenchyma is present as in *Polytoca* (Fig. 33).

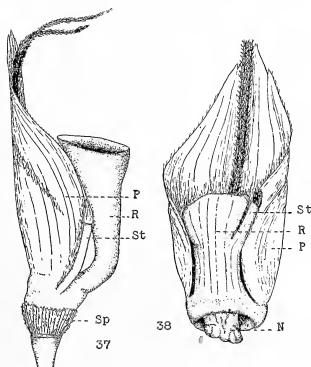
No sexual anomalies have been noted in *Sclerachne*, and it seems not to be materially affected sexually by environmental conditions.

Chionachne

My investigation of *Chionachne* has been limited to a study of good herbarium specimens of *C. cyathopoda* Fr.M., and fragmentary specimens of one or two other species, from Australia. This plant closely resembles *Polytoca* and *Sclerachne* in vegetative habit, and its inflorescence combines some of the characteristic features of both.

The inflorescence is the same modified panicle seen in the other genera (Fig. 24). The pistillate spikelets, usually five or six in number, are borne in a dorsiventral row on the lower part of the rachis. Above these are twenty or more staminate spikelets. The pairing of the spikelets, and fusion of the pedicel with the rachis is the same as in *Polytoca* and *Sclerachne*. The base of the inflorescence is enclosed in a loose spathe.

The outer glume of the pistillate spikelet is less indurated than that of *Sclerachne*, but otherwise the two are much alike



Figs. 37 and 38. Pistillate spikelet of *Chionachne*. P, pistillate spikelet; R, rachis; St, sterile pedicel; Sp, base of spathe, which has been removed; N, nodal pith.

(Figs. 37, 38). In so far as can be determined from the material at hand, the spikelets closely parallel those of *Polytoca* and *Sclerachne* in structure.

Probable Relationships

A tabulation of similarities between the American *Maydeae* and those of the Orient gives an apparently valid basis for placing them in the same group at least for convenience. But to assume a close natural relationship among the genera is probably not warranted by the most significant evidences.

Monoecism is the chief unifying characteristic of the *Maydeae*, but it is the result of a very general tendency throughout the *Gramineae*, especially the *Panicatae*, toward the differential abortion of parts of the flower. The occurrence of monoecism, dioecism, or polygamy is so common in the grasses that the sexual condition cannot be regarded as a strong criterion in the absence of good support of other kinds, or in spite of evidences of inconsistency.

In all the *Maydeae* the fruit is wholly or partly covered by an indurated shell, which is an especially attractive superficial indication of relationship. Its relative absence in *Zea* may be explained by the unusually complicated covering of husks, or as a result of conscious selection by man. But this general occurrence of a hard shell is a deceptive analogy, rather than a homology. The indurated structure is a combination of a glume and an alveolus of the rachis in *Tripsacum* and *Euchlaena*, a spathe in *Coix*, and a glume in *Polytoca*, *Sclerachne*, and *Chionachne*. A tendency toward induration of something connected with the fruit seems, therefore, to be all that the genera have in common, and this is possessed by so many other genera of grasses as to be of little significance in determining tribal relationships.

Geographically the *Maydeae* are sharply divided into two groups, one in each hemisphere, and neither has ever made its way into the field of the other without the help of man. On the other hand, all the genera of each group overlap sufficiently in distribution to suggest an American progenitor and another in Australasia.

The comparative morphology of the genera suggests the arrangement of the *Maydeae* in four categories of phylogenetic relationship:

1. *Zea* and *Euchlaena*. The evidences of relationship between these have been discussed elsewhere (6).

2. *Tripsacum*. Except for monoecism this genus resembles some of the *Andropogoneae*, such as *Manisuris*, much more than the other *Maydeae*.

3. *Coix*. The indurated spathe, and the usual occurrence of the spikelets in groups of three, separate this genus from the other *Maydeae*. Its sexual condition is also much less stable than that of the other oriental genera.

4. *Polytoca*, *Sclerachne*, and *Chionachne*. There is a close similarity among these genera in the fusion of the pedicel of the spikelet with the rachis, the induration of the outer glume of the pistillate spikelet, and the peculiar structure of the parenchyma in the node of the rachis at which the pistillate spikelet is attached.

In habit, structure of inflorescence, nature of the caryopsis, and geographical distribution there is evidence of relationship between the last two of these groups. But there is little to indicate clearly the position of these four eastern genera with reference to the other *Maydeae* or any other tribe. Among the American genera *Zea* and *Euchlaena* present a similar problem.

The writer is greatly indebted to a number of persons and institutions for material and information received in connection with this study. Seeds and herbarium specimens of *Polytoca* and *Coix* were received from K. Rangachariar, Coimbatore, India, and R. W. Shide and W. Burns, Poona, India. Seeds and herbarium specimens of *Sclerachne* were sent by the Botanical Garden of Buitenzorg. C. T. White, of the Botanic Gardens of Brisbane, Queensland, supplied the material of *Chionachne*. The Office of Seed and Plant Introduction, of the U.S. Department of Agriculture, placed at my disposal the seeds of many varieties of *Coix* from India and the Philippine Islands.

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INDIANA UNIVERSITY STUDIES



Study No. 74

INDIANA UNIVERSITY BUREAU OF
SCIENCE SERVICE

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Study No. 74

INDIANA UNIVERSITY BUREAU OF
SCIENCE SERVICE

"We are a people of 110,000,000 on a continent where we have already developed the large proportion of our national resources, a population growing in the next fifty years to perhaps two hundred million people. We must face the solemn economic fact that unless we develop through science the greater utility of our resources, expand by discovery their usefulness, we cannot maintain the standards of living that we now enjoy."—Secretary HERBERT HOOVER, before the U.S. Bureau of Standards.

"I cannot miss this opportunity of pointing out the remarkable fact that since Faraday every great advancement in the art of electrical communications originated, not in the operating rooms of this art or in the research laboratories of the industries, but in the research laboratories of the universities."—M. I. PUPIN (the inventor who made possible long distance telegraphy and telephony) before the recent meeting of the American Association for the Advancement of Science.

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Science and Research in Indiana University

It has been more than a third of a century since Indiana University began active coöperation with the citizens and industrial interests of the state by supplying them with expert information in certain fields of science and by conducting or directing researches on problems whose solution was solicited. For a quarter of a century the number of questions and problems offered for solution increased from year to year at about the same rate as the increase in the number of students enrolled in science and in the number of instructors on the staff of the science departments of the University. Under these conditions each department could, and did, render the service demanded—in its own way, independently of other departments. But with the recent tremendous increase in the number of questions demanding solution and in the amount of research work that needs be done, an increase during the past few years that has far outstripped the growth of the state in population, and the University in the size of its science faculties and their laboratory space and equipment, the University finds that it must organize and further equip its science staff in order to serve the state most efficiently. Indeed, the need of organization was apparent some ten years ago and at that time was met in part by the creation of the Waterman Institute for Research in Indiana University and further by the organization of a University Research Committee. The fact that one of the members of the University Committee was then chairman of the Research Committee of the Indiana State Council of Defense and later Director of Research in the Affiliated Colleges of Indiana and Chairman of the Research Committee of the Indiana Academy of Science has tended to delay the formal and definite organization which the University now announces as *The Bureau of Science Service*.

Object of the Bureau of Science Service

Perhaps the most conclusive argument for it is the fact stated above, that after a third of a century of science service the departments which have been giving it independently find it necessary to combine and organize to function more efficiently in meeting the rapidly increasing demand. Without

doubt the demand will continue to increase at a very rapid rate. Industry is awaking to the fact that a most successful product or method today may be obsolete tomorrow because science finds something better. The great corporations recognize this fact and therefore maintain their own research laboratories in which thousands of trained scientists are giving all their time to developing new machines, new methods, new materials. A 1927 automobile would not run a mile if made from the best steels available when the first automobile was constructed. A phonograph dealer could not sell the best phonograph made ten years ago. The reader would not buy a car painted with the best paint available five years ago. The facts are that while demanding and profiting by the fruits of science, we have become so accustomed to change, development, progress, discoveries, that we do not realize the immensity, the grandeur, the significance of it all, and we fail utterly to appreciate the fact that all of it is the direct result of scientific study and research. There is not a middle-aged person in Indiana who has not had the opportunity of witnessing more scientific progress than took place in all the previous history of the world.

The industries of Indiana are absolutely dependent on their ability to compete successfully with those of other states and other countries. To do so they must enlist the aid of trained research scientists. If the industry cannot afford to maintain its own corps of investigators with a well-equipped laboratory and library, its only hope of survival lies in enlisting the aid of the University in solving its problems. The cost to the state of maintaining an adequately manned and equipped laboratory to which its citizens may go for science service is negligible compared to the benefit which would be derived. Does anyone think that big business would spend more than one hundred million dollars a year in maintaining private research laboratories if the benefits were not greater than the cost?

As a matter of fact, the Geology Department of the University in *Alumni News-Letter*, Vol. 1, No. 2, published January 15, 1913, shows that the work of that department alone had at that date saved the state of Indiana more than fifty-seven million dollars in excess of the cost of maintaining the department. It is not so easy to estimate the value of the work of the departments of Chemistry and Physics. Certain it is,

however, that the returns to the state from research work of these departments have far exceeded the cost of their maintenance. While the problems solved have, in the main, been less pretentious and far-reaching than those credited to Geology, they have been far more numerous. In the aggregate the returns may be compared favorably with those previously noted from the Geology Department.

Service the Bureau Proposes to Render

The Bureau is an organization of some of the faculty members of the departments of Botany, Chemistry, Geology, and Physics in Indiana University for the purpose of making expert knowledge in these fields more accessible to the public, and of encouraging and prosecuting investigations looking toward the improvement in or development of new manufacturing methods and products, and the application of science to all the affairs of life which might be benefited thereby. Under the heading "Botany" are listed some of the lines in which service may be rendered in that field. Under "Chemistry," "Geology," and "Physics," several specific cases are cited to give a concrete idea of the nature of the work that has been done in Indiana University in those fields in the past and the general trend it may be expected to take in the future. Owing to the lack of an organization such as has now been perfected, up to this time no permanent record has been kept of the numerous problems that have been solved and investigations completed. The list on pages 12-20 has been compiled from memory and consequently is far from complete. For the same reason some of the dates may be in error by a year or so. It should be noted that, with the single exception of Geology, the list includes only those things that have been done in Indiana University by members of the Council of this Bureau—men who are still members of the faculty and who have organized to increase their usefulness to the state in the future.

Organization of the Bureau

THE work of the Bureau is in charge of a Council consisting of fifteen members, of whom four constitute the Executive Committee of the Council. The names of the Council with their academic biographies and science service are listed below:

ARTHUR L. FOLEY, Chairman of the Committee

Student, Normal College, two years; Hayward College, one year; Indiana University, three and one-half years; Chicago University, one year; Cornell University, one year; University of Berlin, one term. Graduate, Central Normal College, 1884; Hayward College, 1887; A.B., Indiana University, 1890; A.M., 1891; Ph.D., Cornell University, 1897. Public school teacher, 1884-85, principal, 1885-86, 1887-88. Instructor in Physics, Indiana University, 1890-91; Assistant Professor, 1891-97; Professor and Head of the Department, 1897 to date; University of Denver Summer School, 1913. Fellow, Cornell University, 1896-97; Research Professor, Waterman Institute, 1917-24; Chairman of the Research Committee of the Indiana State Council of Defense during the war; Director of Research in the Affiliated Colleges of Indiana, 1918 to date; member of the Acoustic Committee of the National Research Council; Representative of the American Physical Society on the National Research Council since 1925; Director of the United States Radio School at Indiana University and Consulting Acoustical Engineer during the war; Indiana University Engineer, 1895-1917; Consulting Acoustic Engineer for radio and phonograph companies since 1925; Chairman of the Research Committee of the Indiana Academy of Science, 1922 to date; Associate Physicist of the Riverbank Acoustic Laboratory, of Geneva, Ill., 1922 to date. Inventor of numerous acoustic and mechanical devices. Editor of work on the Velocity of Sound in the International Critical Tables. Author of sixty-six published papers, chiefly descriptive of his researches. "Starred" in *American Men of Science*. Fellow of the American Association for the Advancement of Science, of the American Physical Society, and of the Indiana Academy of Science (President, 1909); member of Phi Beta Kappa (President, 1914), Sigma Xi (President, 1904), and of the Sciencetech Club. Recipient of grants for research work from the Elizabeth Thompson Science Fund, from the American Academy of Arts and Sciences, from the American Association for the Advancement of Science (two grants), from the Riverbank Acoustic Laboratory, and from several industrial companies.

EDGAR R. CUMINGS

A.B., Union College, 1897; Ph.D., Yale University, 1903. Graduate student, Cornell University, 1897. Instructor, Assistant Professor, and Associate Professor, Indiana University, 1898-1909, Professor from 1909, and Head of the Department of Geology, 1903 to date. Acting Dean of

the Graduate School, 1914-23. Fellow of the Geological Society of America, the Paleontological Society, the American Association for the Advancement of Science, the American Geographical Society, and of the Indiana Academy of Science (President, 1925-26); charter member of the Indiana chapter of Sigma Xi (former President); charter member of the Indiana chapter of Phi Beta Kappa (former President). Member of the field staff of the New York Geological Survey, 1896-97 (Bulletin 34, New York Geological Survey). Field Assistant on the U.S. Geological Survey, summer of 1902 (Columbus, Ohio, Folio of the U.S. Geological Survey); member of the staff of the Indiana Geological Survey, 1919 to date. Geological field work in New York State, 1896-97, 1914, 1923; Maryland, 1897; Indiana, 1899, 1900, 1901, 1904-8, 1910-13, 1920-22, 1925-26; Kentucky, 1920; Ohio, 1902, 1920-22; Pennsylvania, 1905; Minnesota and Wisconsin, 1903, 1911; Wisconsin and Michigan, 1925. Member of Governor Ralston's temporary Highway Commission; former President of the Indiana Conservation Association. Author of numerous papers on geological and paleontological subjects, published in scientific journals and proceedings.

ROBERT E. LYONS

A.B., Indiana University, 1889; A.M., 1890; Ph.D., Heidelberg, 1894. Student, Fresenius Laboratories, Wiesbaden; Joergensen's Institute for Physiology of Fermentation, Copenhagen; University of Munich and Berlin. Private Assistant, Professor F. Krafft, University of Heidelberg, 1894; Professor and Head of the Department of Chemistry, Indiana University, 1895 to date; Professor of Organic Chemistry, University of Wisconsin, Summer Session, 1906. Chemist for the State Department of Geology and Natural Resources, 1895-1918; Chairman of the Chemistry Division of the State Council of Defense, 1917-19. Member, the American Chemical Society (President of Indiana Section, 1904-5), and the Deutschen Chemischen Gesellschaft. Fellow, American Association for the Advancement of Science, Indiana Academy of Science. Charter member of the Indiana Chapter of Sigma Xi (former President), and Phi Lambda Upsilon. Author of fifty-five publications on chemical subjects, including papers, books, and patents. Consultant, or director of special investigations, for the Guggenheim Exploration Company, Yukon Gold Company, Shasta Dredging Company, Calumet Baking Powder Company, Crescent Manufacturing Company, Marquette Cement Company, Carter Construction Company, Congoleum Company, Cantol Wax Company, Crider Hominy Company, Tomato Products Company, Blue Label Company, Williams Company, Automatic Fire Sprinkler Company, Helcomb-Hoke Company, Gentry Remedy Company, Matthews Stone Company, McMillan Stone Company, Kane Vegetable Glue Company, Indiana Heating and Lighting Company, Nurre Mirror Plate Company.

DAVID M. MOTTIER

A.B., Indiana University, 1891; A.M., 1892; Ph.D., University of Bonn, 1897; University of Leipzig, 1898; Smithsonian Research Student, Biological Station, Naples, 1898. Instructor in Botany, Indiana University, 1891-93; Associate Professor, 1893-98; Professor and Head of the

Department, 1898 to date. Fellow of the Indiana Academy of Science (President, 1907); life member of the Botanical Society of America; Fellow of the American Association for the Advancement of Science; member of the Washington Academy of Science, American Naturalists, American Fern Society, American Genetic Association; Phi Beta Kappa, Sigma Xi, and the American Forestry Association. "Starred" in *American Men of Science*. Author of two books and fifty technical scientific papers on botany.

Other members of the Council, names arranged alphabetically:

HERMAN T. BRISCOE

Student, Indiana University, six years; Harvard University, one year. A.B., Indiana University, 1917; A.M., 1923; Ph.D., 1924. Austin Teaching Fellow, Harvard University, 1919-20; Instructor in Chemistry, Colby College, Waterville, Me., 1920-22; Instructor in Chemistry, Indiana University, 1922-24; Assistant Professor, 1924-26; Associate Professor, 1926 to date. Five years public school teacher, principal, and superintendent. Military service, May, 1918-January, 1919. Research chemist, Explosives, the Hercules Powder Company, and with the Luckey Lime and Supply Company, Lime Products. Author of papers on the properties and manufacture of lime products. Member of Phi Beta Kappa, Sigma Xi, Alpha Chi Sigma, Phi Lambda Upsilon, American Chemical Society, and Indiana Academy of Science. Recipient of grant for research work from the Waterman Research Fund.

OLIVER W. BROWN

B.S., Earlham College, 1895; A.M., Indiana University, 1896. Graduate student, Indiana University, Missouri School of Mines, winter and spring terms, 1897; Cornell University, 1897-99; University of Wisconsin, summer terms, 1902 and 1903; Honorary Fellow in Engineering, University of Wisconsin, 1903-4. Demonstrator of Chemistry, Indiana Dental College, 1896-97; Assistant in Chemistry, Cornell University, 1898-99; Instructor in Chemistry, Indiana University, 1899-1904; Assistant Professor, 1904-5; Instructor in Chemical Engineering, University of Wisconsin, 1905-6; Associate Professor of Chemistry, Indiana University, 1906-21; Professor, 1921 to date. Formerly chemist for the Muncie Pulp Company and the J. N. Hurty Laboratory; Storage Battery Engineer, the Battery Power Company, the Prest-O-Lite Company, Inc., and the Brown-Smith Battery Company. General Manager and Vice-President of the Brown-Smith Battery Company for eight years. Consulting Storage Battery Engineer for the Yale Storage Battery Company, and formerly for the Picher Lead Company and the Indianapolis Manufacturing Company. Charter member of the American Electrochemical Society and past chairman of the committee on storage batteries; member of the committee on Contact Catalysis of National Research Council. Member of the American Chemical Society, Indiana Engineering Society, Indiana Academy of Science, and Sigma Xi (former President). Author of thirty-two papers and patents covering subjects concerning storage

batteries, electric furnace reduction of metals, physical chemistry, electrochemistry and catalytic production of azo compounds and amines. Licensed Professional Engineer, state of Indiana.

JOHN B. DUTCHER

Student, Normal School, two years; Indiana University, two years. Graduate student, Indiana University, four years; University of Pennsylvania, one year. B.S., Tri-State College, 1900; A.B., Indiana University, 1906; A.M., 1907; Ph.D., 1915. Assistant in Physics, Indiana University, 1906-7; Instructor, 1907-8; Instructor in Physics, University of Pennsylvania, 1908-9; Assistant Professor, Indiana University, 1909-15; Associate Professor, 1915-23; Professor, 1923 to date. Fellow, Indiana Academy of Science. Member of Phi Beta Kappa, Sigma Xi (President, 1923), and American Physical Society.

MASON E. HUFFORD

Student, Normal College, two years; Indiana University, two and one-half years. B.S., Central Normal College, 1904; A.B., Indiana University, 1911; A.M., 1913; Ph.D., 1916. Graduate student, Indiana University, five years; University of Chicago, one-half year; Cavendish Laboratory, Cambridge, one year (1924-25). Assistant, Indiana University, 1911-12; Instructor, 1912-17; Assistant Physicist, Bureau of Standards, 1917-18; Acting Assistant Professor of Physics, Swarthmore College, 1918-19; University of Utah Summer School, 1920; Assistant Professor, Indiana University, 1919 to date. Member of the American Physical Society, Indiana Academy of Science, Sigma Xi (President, 1926), and Phi Beta Kappa.

WILLIAM N. LOGAN

A.B., A.M., Kansas University, 1896. Fellow in Geology, Chicago University, 1898-1900; Ph.D., 1900. Principal, Scottsville Schools and Beloit High School, Kan., 1891-93; Superintendent of Public Schools, Pleasanton, Kan., 1896-98. Member of the Kansas Geological Survey, 1895-96, 1899-1900. Member of Bad Lands Expedition in South Dakota for Field Museum, 1897. Member of Wyoming Scientific Expedition and collector for Kansas University Museum, 1898. Chapin Professor of Geology and Mineralogy, St. Lawrence University, 1900-3. Field Geologist in New England and on New York Geological Survey, 1902-3. Professor of Geology and Mining Engineering, Mississippi Agricultural and Mechanical College, 1903-16. Geologist for Experiment Station and on State Survey from 1904. Dean of School of Science, 1912-16. Associate Professor of Economic Geology, Indiana University, 1916-19; Professor of Economic Geology and State Geologist, 1919 to date. Head of the Division of Geology of the Indiana Conservation Department. Life member and Fellow of the American Association for the Advancement of Science; Fellow of the Geological Society of America, the Royal Society of Arts, and the Indiana Academy of Science. Former member of Kansas and Mississippi Academies; Member of Sigma Xi (past President), Phi Beta Kappa. Examiner of mineral and mining properties for the Indiana Securities Commission. Member of State Geological Surveys in Kansas, New York, Mississippi, and Indiana. Investigator of phases of geology in more than twenty-five states and countries. Author of

more than seventy-five publications dealing with phases of the geology of Colorado, Wyoming, Kansas, Iowa, Mississippi, New York, Indiana, and other states.

CLYDE ARNETT MALOTT

A.B., Indiana University, 1913; A.M., 1915; Ph.D., 1919. School superintendent, 1913-14; Assistant in Department of Geology, Indiana University, 1914-15; Instructor, Fort Wayne High School, 1915; Tutor, Department of Geology, Indiana University, 1915-16; Instructor, 1916-18; Assistant Professor, 1918-21; Associate Professor, 1921-24; Professor, 1924 to date. Fellow of Indiana Academy of Science, American Association for the Advancement of Science, and the Geological Society of America. Member of Sigma Xi. Member of staff of Oklahoma Geological Survey, summer of 1916. Member of staff, Division of Geology, Indiana Department of Conservation, 1919 to date.

FRANK C. MATHERS

Student, Indiana University, six years; Cornell University, two years. A.B., Indiana University, 1903; A.M., 1905; Ph.D., Cornell University, 1907. Instructor in Chemistry, Indiana University, 1903-5; Assistant Professor, 1907-13; Associate Professor, 1913-23; Professor, 1923 to date. Scholar, Cornell University, 1905-6; Fellow, 1906-7. Laboratory Assistant, Oliver Iron Mining Company, Mountain Iron, Minn., summer of 1903; Special Research Chemist, Roessler and Hasslacher Chemical Company, Perth Amboy, N.J., summer of 1917; Consulting Electrochemist on tin refining, American Smelting and Refining Company, Mauruer, N.J., 1917-18; Expert Electrochemist, Chemical Warfare Service, Washington, D.C., summer of 1918; Consulting Chemist on Oxidizing Silver, Oneida Community Company, Oneida, N.Y., and William Rogers Company, Niagara Falls, N.Y., 1919 and 1922; Consulting Chemist on Hydrated Lime, Charles Warner Company, Wilmington, Del., summers of 1925 and 1926. Member of American Chemical Society, American Electrochemical Society, and Sigma Xi. Author or joint author of ninety papers, or manuals. Recipient of grants for research from the American Electrochemical Society and the National Lime Association (two grants).

ROLLA R. RAMSEY

Student, Miami University (Scholarship), 1891-92; Indiana University, 1893-95. A.B., Indiana University, 1895; A.M., 1898; Scholar, Clark University, 1898-99; Cornell University, 1900-1; Ph.D., Cornell University, 1901; European universities, 1912-13. Science teacher, Decatur High School, 1895-96; Laboratory Assistant, Indiana University, 1896-97; Professor of Physics, Westminster College, Pa., 1897-98; Assistant, Cornell University, 1899; Instructor, Indiana University, 1900; Instructor, University of Missouri, 1901-3; Assistant Professor, Indiana University, 1903-5; Associate Professor, 1905-19; Professor, 1919 to date; Chief Instructor, Indiana University United States Radio School, 1918; Bureau of Standards specialist in Radio-Activity of Waters and Materials. Fellow, American Physical Society, American Association for the Advancement of Science, and Indiana Academy of Science. Member, Institute of Radio Engineers, Sigma Xi (President, 1917), Phi Beta

Kappa, and Sciencetech Club. Inventor of Model of the Atom. Author of *Experimental Radio*, second edition, revised. Author of fifty-four scientific papers.

WILLIAM M. TUCKER

Graduate, Indiana State Normal School, 1905; A.B., Indiana University, 1908; A.M., 1909; Ph.D., 1916. Five years of grade teaching, four years of high school teaching. Head of the Department of Geography, Moorhead (Minn.) Normal School, 1913-15; Adjunct Professor, University of Texas, 1917; Assistant Professor, Ohio State University, 1917-20; Assistant and Associate Professor, Indiana University, 1920 to date. Fellow, American Association for the Advancement of Science and of Indiana Academy of Science. Member of Sigma Xi (President, 1925); Indiana State Geological Survey, 1909-11; of special Government force to investigate pyrite in coal fields of United States. In charge of work in Ohio coal fields, 1918. State Hydrologist for Indiana Department of Conservation, 1920 to date. Member of the Gimbel Expedition to British Guiana, study of South American fishes, 1910. Expert witness in case of *McDaniel vs. Forrest City Cemetery Company*, Forrest City, Ark., pollution problem, 1926; *Farmers vs. C. I. and L. Railway Company*, flood destruction, pending. Author of numerous papers in the *Reports* of the Indiana State Geological Survey, *Economic Geology*, *Proceedings* of the Indiana Academy of Science, and *Publications* of Fish and Game Division of the Indiana Conservation Department.

JAMES M. VAN HOOK

Student, Borden Institute, three years; Indiana University, three and one-half years; Cornell University, four years. Graduate of Borden Institute, 1894; A.B., Indiana University, 1899; A.M., 1900. Teacher in public schools, five years; Instructor in Borden Institute, 1894-96, and 1897-98; Assistant Botanist, Cornell University, 1901-2; Assistant in Plant Pathology in the Extension Department, Cornell, 1902-4; Assistant Botanist, Ohio Agricultural Experiment Station, 1904-7; Assistant Professor of Botany in Indiana University, 1907-21; Associate Professor, 1921-25; Professor, 1925 to date. Fellow of the American Association for the Advancement of Science and of the Indiana Academy of Science; member of the American Phytopathological Society, the Crop Protection Institute, the Botanical Society of America, Phi Beta Kappa, and Sigma Xi. Author of twenty-six published papers.

PAUL WEATHERWAX

A.B., Indiana University, 1914; A.M., 1915; Ph.D., 1918. Instructor in Botany, Indiana University, 1915-19; Associate Professor of Botany, University of Georgia, 1919-21; Associate Professor of Botany, Indiana University, 1921 to date. Fellow in the Waterman Institute for Scientific Research since 1925. Member of Phi Beta Kappa and Sigma Xi. Fellow in the American Association for the Advancement of Science and the Indiana Academy of Science. Member of the Botanical Society of America, American Naturalists, American Genetic Association, and the Torrey Botanical Club. Author of twenty-five papers on various botanical subjects, and a book on the Indian corn plant.

Past and Future Services of the Bureau

Botany

The botanists of the Bureau of Science Service are prepared to serve the people of Indiana in any of the following ways:

1. Identification of, and information concerning plants,—particularly grasses and certain groups of fungi.
2. Histological and microchemical properties of woods, plant fibers, etc., to meet definite problems.
3. Research in physical, chemical, and histological properties of grains, as applied to milling and the manufacture of cereal products.
4. Plant breeding for definite results.
5. Problems in the adaptation or acclimation of plants to new environments for specific purposes.
6. Any problem connected with the growth, improvement, or utilization of corn.
7. Brief or extended courses of special individual training for any person of promise doing industrial work with plant materials or processes of any kind.

Chemistry

Professor ROBERT E. LYONS

1905. Modimilk Company, Indianapolis. Production of condensed, modified cows' milk for infants.
1906. Fisher Automobile Company, Indianapolis. Production of non-corrosive anti-freeze radiator solution.
1907. Vitrified Brick and Tile Company, Bloomfield. Composition and experimental kiln burnings of shale.
- 1909-11. Williams Brothers Company, Detroit, Mich.; Blue Label Company, Rochester, N.Y. Effect of sodium benzoate upon digestibility of canned foods.
1910. Pitman-Myers Company, Indianapolis. Concerning validity of United States patents on production of aspirin.
- 1911-15. Guggenheim Exploration Company, New York; Natomas Consolidated Company, San Francisco; Yukon Gold Company, New York; Shasta Dredging Company, San Francisco. Systematic study of losses in gold dredging in California and Alaska, including causes and remedies. Recovery of rusty gold and platinum by amalgamation.
- 1914-15. Calumet Baking Powder Company, Chicago; Crescent Powder Company, Seattle. Experimental study of the effect of egg albumen upon leavening power of baking powder.
- 1916-18. Gentry Remedy Company, Bloomington. Development of sulphur soap.

1919. W. F. Myers Company, Bedford. Effect of re-setting of diamonds in stone cutting saws.
- 1920-22. Congoleum Company, Philadelphia. Oxidation of linseed oil and acceleration of drying of paint.
1922. Cantol Wax Company, Bloomington. Development of wax products.
- 1922-23. Association of Indiana Furniture Manufacturers. Investigation of the validity of patents on vegetable glue.
1924. Interstate Public Service Company. Development of a solvent for "tar drip."
1924. Hunter Valley Stone Company, Bloomington. Processes for artificial coloring of oölitic limestone.
- 1924-26. Nurre Mirror Plate Company, Bloomington. (a) Development of methods of glass decoration. (b) Methods for salvaging silver in mirror making.
- 1926-27. Calumet Baking Powder Company, Chicago. Continuation of egg albumen baking powder investigation.

Professor OLIVER W. BROWN

1899. Muncie Pulp Company, Muncie. Determination of conditions necessary for successful operation of electrolytic bleaching plant.
1914. Prest-O-Lite Company, Indianapolis. Determination of causes of and remedies for storage battery deterioration.
1924. Indianapolis Manufacturing Company. Treatment of storage battery wood separators before drying.
1925. Newport Company, Carrollsville, Wis. Catalytic processes for the manufacture of amines and azo compounds.
- 1925-26. Yale Battery Company, Indianapolis. Battery production problems.
1926. Diamond Separator Company, Franklin. Method of drying storage battery separators.

Professor FRANK C. MATHERS

1917. Batavia Chemical Company, Genessee, N.Y. Lead perchlorate for electro-plating lead.
1917. Roessler and Hasslacher Chemical Company, Perth Amboy, N.J. Electro-plating zinc from zinc cyaniding baths.
1917. American Smelting and Refining Company. Improved baths for electro-refining tin.
1918. Chemical Warfare Service, Washington, D.C. New methods of making fluorine gas.
1919. Oneida Community Company, Oneida, N.Y. Platinum substitutes in staining and oxidizing silver.
1921. William H. Rogers, Ltd., Niagara Falls, N.Y. Platinum substitutes in staining and oxidizing silver.
1922. National Lime Association, Washington, D.C. Quick setting lime plaster.
1924. National Lime Association, Washington, D.C. Stabilizing magnesium carbonate; hydrated lime ready mixed plaster.

1925. Charles Warner Company, Wilmington, Del. Improved lime from rotary kiln.
1926. Charles Warner Company, Wilmington, Del. Finishing hydrate from Pennsylvania dolomite.
1926. Roessler and Hasslacher Chemical Company, Perth Amboy, N.J. Baths for electro-plating tin.
1926. Hoosier Lime Company, Salem. Lime for softening water.
1926. Herzog Lime Company, Faust, Ohio. Tests on hydrated lime as a finisher.
1927. Shafer Engineering Company, Indianapolis. Refining elastite for paints.
1927. Western Lime and Cement Company, Milwaukee, Wis. Finishing hydrates from Wisconsin dolomites.

Associate Professor HERMAN T. BRISCOE

1923. Luckey Lime and Supply Company, Toledo, Ohio. Production and quality of hydrated lime.

Geology

The accompanying statement of the Division of Geology of the Conservation Commission indicates some of the more important specific activities of the Division since its inception in 1919. It should be understood, however, that the Division of Geology of the Conservation Commission is the lineal descendant of the old Indiana Geological Survey; and that the chief of the Division, Professor Logan, State Geologist, is Professor of Economic Geology in Indiana University, and all of the scientific staff of the Division, with the exception of one man, are members of the staff of the Department of Geology of Indiana University.

The following additional facts also need to be mentioned. The Indiana Geological Survey came into existence in 1837. After two years it ceased operations, but was revived in 1859, and has been serving the state ever since. The second State Geologist, Richard Owen, was a member of the Faculty of Indiana University. W. S. Blatchley, State Geologist from 1894 to 1911, was a graduate of Indiana University. The following are a few of the graduates and of the faculty of the University who have contributed to the manifold services and publications of the Survey, often without remuneration: J. W. Beede, W. S. Blatchley, J. C. Branner, H. N. Coryell, E. R. Cumings, J. J. Galloway, E. M. Kindle, W. N. Logan, C. A. Malott, G. C. Mance, J. F. Newsom, Richard Owen, J. R. Reeves, C. W. Shannon, C. E. Siebenthal, L. C. Snider, and

W. M. Tucker. Their studies have covered the widest range of subjects: Coal, Building Stone, Oil and Gas, Clays, Soils, Iron Ore, Mineral Waters, Roads and Road Metal, Water Power and Water Sources generally, Kaolin, Mapping of Geologic Formations, Fossils and Stratigraphy. This list is by no means exhaustive.

INDIANA DIVISION OF GEOLOGY

The following is a very brief statement, by Professor William N. Logan, of the work of the Division of Geology of the Conservation Commission since its inception in 1919:

1919. A survey of the kaolin deposits of Lawrence and adjacent counties made and topographic map of the region published under the title *Kaolin of Indiana*. Prepared "Mineral Resources of Indiana," published in *Year Book*. Made survey and report on the coal under Wabash River. Made survey of coal waste in Indiana, published in *Year Book*.
1920. Survey of the coal fields of Indiana and study of the coals and associated clays and shales begun. Investigation of oil shales of Indiana begun. The following reports: *The Building Stones of Indiana*, *The Cement Materials and Industry in Indiana*, *Petroleum and Natural Gas in Indiana*, prepared and published.
1921. Made a geological survey of the Clay City quadrangle; continued the survey of the coal field; at request of Chicago Gas and Fuel Company made a study of geological and structural features in the Tipton-Howard gas field and furnished report; outlined structural conditions in the Glezen and Rogers' Station areas of Pike County and prepared structural maps for the oil industry; established a laboratory for the investigation of Indiana oil shales in coöperation with the U.S. Bureau of Mines. Prepared and published the following reports: Reports on oil shales of Indiana published in *Street, Mining Engineering*, and *Oil Shale Review*. Prepared report of Petroleum in Indiana for *Petroleum Register*. Inspected and plugged 424 abandoned deep wells. Prepared and published a map of the coal fields of Indiana. Prepared: "Gold in Indiana," "Potash in New Providence Shale," "Division of Geology," published in *Year Book*, 1921.
1922. Continued the survey of the coal fields; made a survey of the Brewersville gas area, furnished map and report; surveyed Oatsville oil field and made structural map; continued survey of oil shale area, with Mr. Reeves, and work on clay and shales of Indiana; investigated stripped coal lands with State Forester, made report and recommendations for reclaiming such lands; made survey of the Laconia gas field in Harrison County, prepared map and report; surveyed Oakland City oil pool. Published jointly with members of the staff, the *Handbook of Indiana Geology*, 1,120 pages, which discusses the geography, physiography, hydrology, stratigraphy, eco-

conomic geology, and oil shales of Indiana; published "Coals of the Allegheny Division," "Oil Shales in Indiana," papers published by the Bureau of Mines; "Natural Gas in Indiana," *Oil and Gas Journal*. Published reports on: "Division of Geology," "Peat in Indiana," and "Section through New Albany Shale," in *Year Book*.

1923. Surveyed Oatsville oil field, made structural map; continued coal survey. Professor Malott investigated Chester formations in Indiana and studied the geology of Perry County and mapped the structural conditions; Professor Logan and Mr. Reeves prepared papers on oil shales in Indiana, published by U.S. Bureau of Mines; continued investigations of clays and shales. Published "Geological Conditions in the Oil Fields of Southwestern Indiana," "Petroleum Conservation," and "Petroleum in Indiana in 1923."
1924. Investigated the following geologic problems: investigated and furnished report on coal along its lines to the Southern Railroad; investigated limestone deposits along its lines and furnished report to the Wabash Railroad; supplied information to County Commissioners regarding limestone to be used in Fountain County Court House; investigated and gave sources of domestic supplies of water to citizens of Jennings, Carroll, and Miami counties; examined foundation and building stone to be used in hotel at Clifty State Park; surveyed and furnished report on Silver Lake as a proposed Boy Scout camp; examined and made report on molding sand deposit in St. Joseph County; supplied information on the mineral resources of Indiana to the Chamber of Commerce of Indianapolis, to the Indiana Bell Telephone Company, and to the Public Utilities Commission; tested and reported on fire brick for the Simpson Brick Company; examined and reported on coal from Turkey Run State Park; supplied information regarding coal on state lands to Executive department; and made survey of coal removed from State lands underlying the Wabash River. Published "Petroleum in Indiana in 1924," "The Hotmire Oil Field," "The Conservation of Natural Gas in Indiana," "Progress of Archaeological Investigations," and other papers. Made survey of the Mt. Carmel fault; continued investigations of coal, clays, and oil shales.
1925. Investigated a large number of problems, among them the following: a microscopic and mineralogical investigation of certain materials for an Indianapolis ceramic firm to determine the cause of spotting in white ware; study of properties of slip clays submitted by a Huntingburg pottery and a comparison with native Indiana slip clays; determination of amount of oil in a shale from Bartholomew; investigated the influence of stylolites on limestone used in the manufacture of glass at the request of a Bedford limestone company; investigated the occurrence of selenite in Washington County; made abrasive tests on samples of limestone and determined French coefficient of wear for a Bloomington stone company; examined and made fractional distillation of samples of oil from Williamsport, Montmorenci, and Gentryville; furnished information regarding the mineral resources of Indiana to the Indianapolis Board of Trade for their annual report.

Began (with Mr. Esarey) the study and mapping of the Indiana Oolitic limestone area; continued the investigation of the Mt. Carmel fault. Mr. Stockdale studied the Borden formations, and Professor Cumings and Mr. Shrock the Silurian formations. Studied the coals, the clays, and shales of Indiana. Issued monthly reports on oil and gas; published "Losses of Coal in Indiana," "Petroleum Industry in Indiana in 1925," "Progress of Archaeological Work," "Laws and Regulations Affecting Oil and Gas Development Regulations in Indiana." Made a geological survey of Harrison County.

Professor CLYDE A. MALOTT

1917. Petroleum geologist, staff of F. J. Fohs, consulting geologist, Tulsa, Okla.
- 1918 (summer). Petroleum geologist, in behalf of the Empire Gas and Fuel Company, Bartlesville, Okla. Determined oil and gas possibilities in parts of Greene, Orange, and Crawford counties, Ind.
- 1919-22 (summers). Active member of the staff of Division of Geology, Indiana Department of Conservation. Determined detailed stratigraphy of upper Mississippian formations of southern Indiana; collected detailed data on coal formations in parts of Clay, Owen, Vigo, Sullivan, and Greene counties, Ind.; determined structural geology pertaining to oil and gas possibilities in parts of Pike, Orange, Martin, Greene, Daviess, Crawford, Washington, and Harrison counties, Ind.
- 1923 (summer). Petroleum geologist, behalf of the Empire Companies, Bartlesville, Okla. Determined oil and gas possibilities in Perry County, Ind.
- 1924 (summer). Petroleum geologist, behalf of the Pure Oil Company, Columbus, Ohio. Determined oil and gas possibilities of the West Franklin limestone out-crop area in Gibson and Vanderburg counties, Ind.
- 1926 (summer). Field research, Waterman research funds, Indiana University. Made study of upper coal-bearing strata in southwestern Indiana, and made a topographic and hydrologic survey of the upper part of Lost River basin in Washington and Orange counties, Ind.
- 1916 to present. Numerous investigations and reports on industrial and civic geologic work: coal deposits; oil and gas possibilities in special areas; oolitic limestone in Monroe and Lawrence counties, Ind., estimating quantities, determining qualities, and giving estimates of values with respect to special areas; water supply studies; studies of artificial lake sites with recommendations; etc.

Associate Professor WILLIAM M. TUCKER

- 1909-11. Geological Survey of Indiana. Water power of Indiana.
- 1916-17. Geological Survey of Indiana. Hydrology of Indiana.
1918. U.S. Government Special Force. Pyrite in coal fields of United States. In charge of work in Ohio coal fields.

- 1920 to date. Indiana Conservation Department Hydrologist.
1922. City of LaPorte. Lake recession.
1923. South Bend. Expert counsel on city water surveys.
1922-25. Indiana Fish and Game Division. Physiographic survey of thirty-seven Indiana lakes.

Physics

Professor ARTHUR L. FOLEY

- 1895-1917. Installed the first Indiana University electric plant. Designed the heating and electric systems in most of the University buildings. Installed the tunnels and stokers. Architect of power house, University pumping station and reservoir, building for printing-plant, Maxwell Hall addition, Well House, and part of Student Building. Planned the Student Building grading and walks and the University Waterworks, together with the water aerating system and the apparatus for exhibiting the water level in a distant reservoir. Devised the method of acoustic correction applied in the Student Building. Superintended the construction of nine of the University buildings. Among the engineering services rendered outside the University during this interval may be mentioned the tests of the municipal electric systems of Bloomington, Vincennes, and Union City; tests of the heating systems of numerous buildings such as the Masonic building at Indianapolis; the acoustic correction of several churches, school buildings, and hospitals; gas and gas meter testing for the city of Bloomington.
1907. T.H.I. and E. Ry. Co. Experimental study of air velocities and pressures at various points about a traction car in motion, and the question of danger to one standing near a car moving at different speeds. Expert witness.
1917. Study and investigation of the problem of locating submarines by reflected sound waves.
1922. Pennsylvania Railway Company. Study of efficiency of locomotive whistle, bell, and headlight under various operating and weather conditions. Expert witness.
1923. People's Telephone Company, Terre Haute. Effect of high voltage lines on telephone operation. Expert witness.
1925. T. H. I. and E. Ry. Co. Effect of the proximity of, or crossing over of, high voltage lines on the present and future operation and development of electric railways. Expert witness. Constant level fuel tanks, Sneath Glass Company, of Portland. Resistance and other properties of copper alloys, Kokomo and Indianapolis capitalists; photographs of sound waves in auditoriums, also study of power required to drive spoked and disk wheels, for the Riverbank Laboratory, Geneva, Ill.; sound wave photographs for lantern slide manufacturers and textbook authors.
1926. Transparency of glass for ultra-violet light, for a tuberculosis hospital architect, also for a poultry-breeder. Study of radio horns and designing of Purotone horn speaker, Showers Brothers Com-

pany, of Bloomington. Study of phonograph horns, tone arms, and reproducers, and designing Isosonic horn, Starr Piano Company, Richmond, Ind.

Professor ROLLA R. RAMSEY

1914. Test for radio-activity of water of Young's Well, Brown County, Ind.
1917. Central Stone Mill, Bloomington. Test of wattmeters.
1924. Test of samples of ore from Seattle, Wash.
1925. J. R. O'Brien, Lockport, N.Y. Test of sample of water for radio-activity.
1926. Radium Products Company, Chicago. Test on "radium vitalizer."
1926. DeForest Grant, New York City. Test of radium and thorium water for internal use.

Professor JOHN B. DUTCHER

The nature of explosions in gases. Device for observing strain in glass. Improved artificial gas-burner for use in laboratories. Origin of the excess of nitrogen in pockets in coal mines. Thin-asbestos sheet as a covering for hot air pipes.

Assistant Professor MASON E. HUFFORD

- 1917-18. United States Military Department, Bureau of Standards. Detection and measurement of ground waves produced by the firing of large guns.

Conditions under which Service is Offered

The Science Service Bureau has been organized primarily for the citizens of Indiana and for such will function without fees in giving information and advice when it can be done without additional work and investigation on the part of the one giving it. But on account of the varied character and range of researches, no definite statement can be made that will cover all cases of this kind. The conditions and terms under which investigations will be undertaken must be determined in each individual instance.

The attention of manufacturers, business corporations, and men of means generally is called to the fact that the University has considerable equipment in the way of libraries and laboratories with trained scientists in charge. Under the direction of these men many research problems might be solved at much smaller expense than they could be solved in any other manner,—by providing the funds for research

fellowships in the University.* The benefits to be derived from such fellowships would not accrue to the donors only. Research fellowships would enable worthy but needy students to continue their University work and fit themselves for independent research positions later on. Where else may the research workers of the future be trained? Their training is a very important phase of the work of the University, and the persons who provide fellowships to aid the University in giving such training are really public benefactors. Again quoting from the address of Herbert Hoover:

Science stands for far greater things than purely material benefits. Research, development, and engagement in science is an engagement in the elaboration of truth, the discovery of truth. It is a process of improvement in the veracity of man and precision of thought, and those indeed are spiritual benefits, for from the truth, the development and science of truth in our people, must come an appreciation of those things that lie in the realms of the imponderable and that lie out of the range of the material in life.

Since the members of the Council of this Bureau of Science Service are regular members of the faculty of the University, and as such are required to carry, and have been required to carry in the past, the same teaching load as do members of the faculty who are not members of the Bureau, whatever service they render or investigations they undertake must be done outside their regular teaching hours.

Communications with reference to the work of the Bureau should be addressed

BUREAU OF SCIENCE SERVICE,
Indiana University,
Bloomington, Ind.

* Special Fellowships in Chemistry supported by industrial corporations: (1) The Grasselli Chemical Co. (Cleveland, Ohio). Two Graduate Fellowships for each of the past six years. (2) The National Lime Association, of Washington, D.C. One Graduate Fellowship for four years.

Science Service in Other Fields

The present organization of the Bureau of Science Service includes only those fields in which service has been most frequently called for in the past. Other fields will be added if the demand for service in them warrants their inclusion. Correspondence from those having questions or problems in such fields will be turned over to the person best qualified to give the service desired.

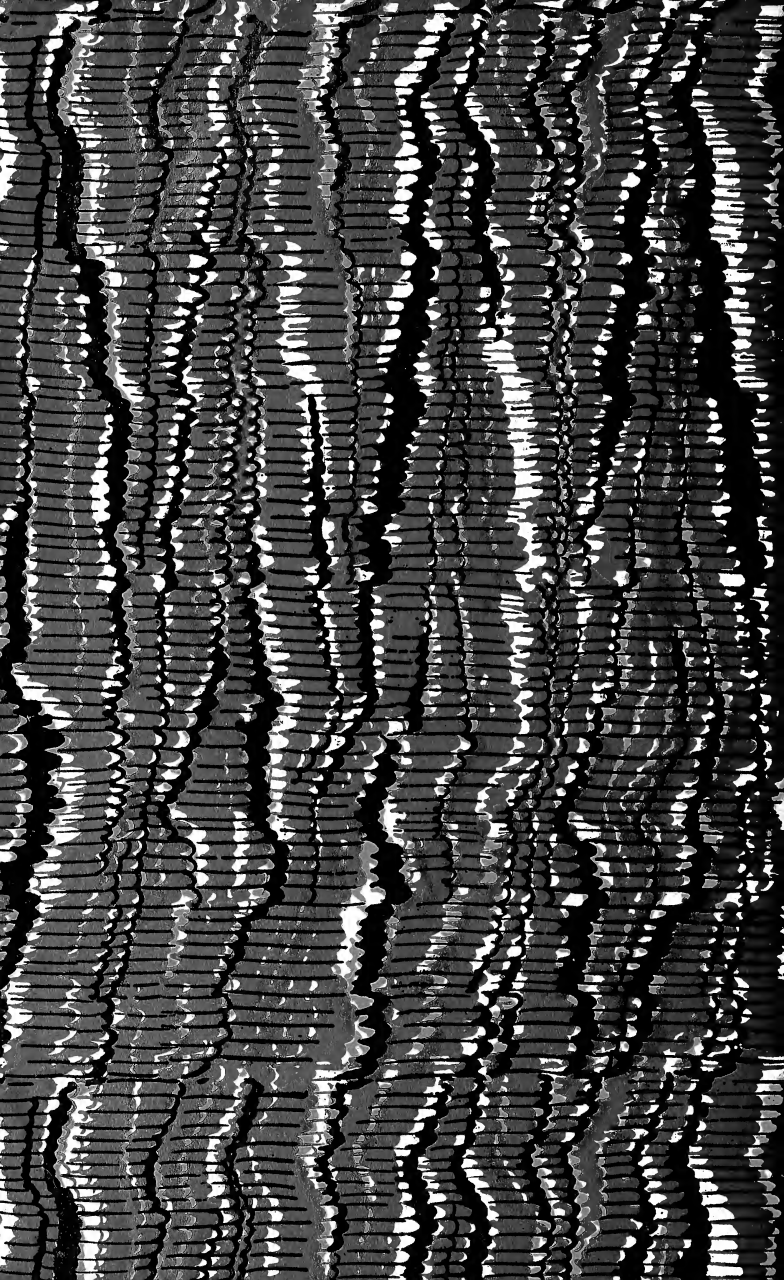
Attention is called particularly to the expert service which the University can render in connection with fisheries, stream pollution, and water supplies.

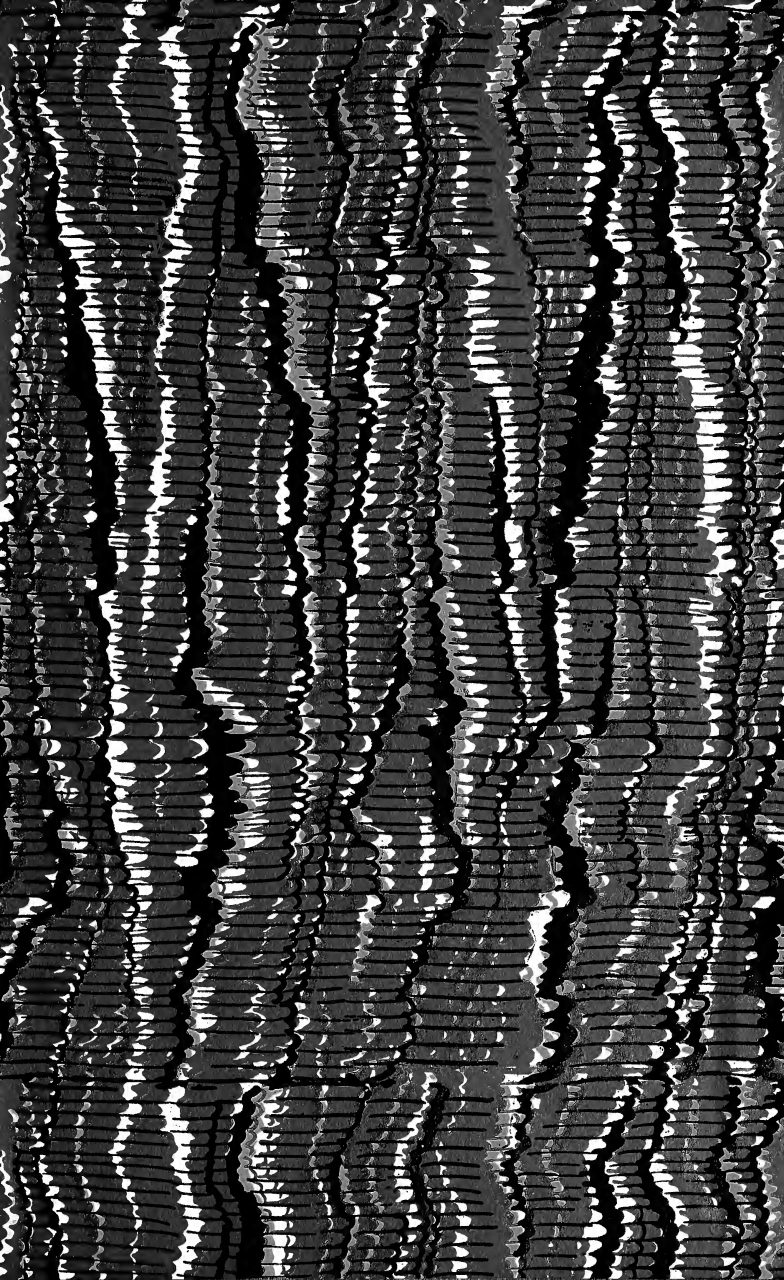
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